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NO.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

FRANK GRACE, ET AL,
Petitioners

V.

FRED BUTTERWORTH, ETC., ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Factual Basis Common To Questions

After these habeas corpus petitioners' Massachusetts murder convictions were affirmed, the Massachusetts Supreme Judicial Court granted a new trial in another case in which the same trial judge in an almost identical charge to the jury defined proof beyond a reasonable doubt solely in terms of examples of "important" decisions in their "personal lives" and informed the jury of the sentencing and parole consequences of verdicts of first and second degree murder, but petitioners' convictions were then reaffirmed by the state court by constructing supposed distinctions, and on appeal of the dismissal of their habeas corpus petition the First Circuit held the state court had not been "less than even-handed" because it could be making the ruling in the other case prospective only and, alternatively, the charge was not constitutionally defective anyway. About a month later, the state court again held the same trial judge's same charge to be erroneous in yet a third case, however, this time it specified

the same charge was "constitutionally inadequate" and that "retroactive application" of that holding was mandated. A petition for rehearing was allowed by the First Circuit, and upon rehearing, that court recognized that its basis for denying habeas corpus had now been eliminated by the state court, but rather than determine if it were "arbitrary and capricious" for the state court to deny only these petitioners a new trial after a conviction under the same unconstitutional charge, the lower court, in an unprecedented procedure, resubmitted the case to the state court (specifically "retain[ing] jurisdiction", however) for it to attempt "in the first instance" to reconcile its refusal of relief to petitioners with its other decisions. The state court, characterizing that unique referral a "rehearing", then reaffirmed the convictions by constructing a new distinction, and then in a three paragraph Per Curiam opinion the First Circuit held the state court's "explanation" removed any Fourteenth Amendment error.

1. Was petitioners' jury instruction, defining "beyond a reasonable doubt" in terms of specific examples of decisions in the jurors' "private lives" and informing the jury of the sentencing and parole consequences of the available verdicts, "constitutionally inadequate", as the highest state court and other Federal courts substantively so held, and the conflicting opinion of the court below erroneous?

2. Was the Massachusetts Supreme Judicial Court itself "less than even-handed" by constructing specious distinctions to try and reconcile its other precedents with its refusal to grant petitioners a new trial and due process therefore denied?[1]

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[1] Parties to the proceeding below: the petitioner-appellants were Frank Grace and his brother, Ross Grace, and the respondent-appellees were Fred Butterworth and Michael Fair, who were the respective Superintendents of the Massachusetts correctional institutions in which they were serving life terms when their petition for habeas corpus was filed, both of whom were represented in the court below by the Attorney General for the Commonwealth of Massachusetts.

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OPINIONS BELOW

All the opinions of the United States Court of Appeals for the First Circuit--the original opinion, the opinion "On Petition For Rehearing", and the "Opinion After Submission of Case to State Court" (sic)--appear at 635 F.2d 1 (1980), and are also set out in the "separately presented" Appendix hereto (hereinafter cited as "App. ___"), on pages 1-21. [2]

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[2] The Massachusetts Supreme Judicial Court opinions also relevant hereto (opinions on petitioners and two others) are cited in those opinions of the court below, but they are also set out in toto or, where noted, in relevant part in the "separately presented" Appendix hereto, on pages 37-57; 63-86 and the ones relevant to petitioners are officially reported at 376 Mass. ___, 381 N.E. 2d 139 (1978), and ____Mass. ____, 412, N.E. 2d 354 (1980).

JURISDICTION

The judgment on the Petition For Rehearing here sought to be reviewed was entered on December 31, 1980, and one issue, which is the subject of the first question presented, supra, is from the original opinion of the lower court of February 5, 1980, the appeal time on which being tolled by the allowance of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2101(c), since petitioners seek review of a decisicn of a court of appeals on a civil matter praying the issuance of a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1., Fourteenth Amendment, Constitution of the United States of America (in relevant part): "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The basis for federal habeas corpus jurisdiction in the court of first instance was 28 U.S.C. §2254.

Since "the facts material to the consideration of the questions presented" herein pertain only to events of legal significance occurring after petitioners' murder convictions were initially affirmed "on the merits" by the Massachusetts Supreme Judicial Court and the dismissal of their first petition for habeas corpus affirmed by the court below here , matters relating to events of the murder and the trial testimony need not be alluded to herein.[3] Thereafter, on July 22, 1977, the Massachusetts Supreme Judicial Court handed down its opinion in Commonwealth v. Ferreira, 373 Mass. 116, 364 N.E. 2d 1264 (1977) (set out in relevant parts at App. 63-77), in which it reversed a murder conviction from years previous and

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[3]All those previous official opinions are cited in the opinion here appealed from, 635 F.2d at 3, App. 1-36 should the Court wish to apprise itself or those facts.

ordered a new trial, holding that the same judge who had presided at petitioners' trial had erroneously defined proof beyond a reasonable doubt and had informed the jury of the sentencing and parole consequences of first and second degree murder verdicts. A review of the jury instructions at petitioners' trial disclosed that on those same two issues the same trial judge had, almost word for word, given the very same instructions now held to be reversible error in the Ferreira case,[4] so a motion for a new trial was filed, alleging that a new trial for petitioners was now mandated by Ferreira. The motion was

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[4]There is no question or argument about the fact that the two charges were almost identical. The respondents have admitted that the two instructions are "substantially the same", Grace v. Butterworth, 635 F.2d 1, 8, n. 2 (1st Cir. 1980), never have argued any lack of identity, and the court below ruled that the two instructions are "substantially identical." Grace v. Butterworth, supra, at 4. In order that the Court may assure itself that that is so, however, the relevant portions of the two charges are set out, word for word, phrase by phrase, in the separate Appendix hereto on pages 87-94.

denied by the trial judge and the denial affirmed by the Massachusetts Supreme Judicial Court because of supposed differences in the two cases (App. 37-41)[5] A petition for habeas corpus relief was then filed in the United States District Court for the District of Massachusetts, the petition dismissed, and on February 5, 1980, the dismissal affirmed on appeal without reaching "the merits of the [state] court's attempts to distinguish the two cases" because the state court had in part relied on the "procedural default" that no exception was taken at trial, years before Ferreira, to the reasonable doubt portion of the charge, there was therefore "a waiver", and that was "sufficient to dispose of the issue", because, even though Ferreira had not excepted either, Massachusetts had complete discretion over the retroactive application of its newly established Ferreira rule, and, alternatively, that the charge was not constitutionally inadequate. (App. 20-36).

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[5] A Petition For Rehearing was filed (App. 58-62) in which petitioners pointed out to the court that its proffered distinctions between this case and Ferreira were specious and arbitrary and the court itself was therefore creating needless constitutional error, but the Petition was summarily denied without opinion.

A few weeks before that opinion of the court below, however, the Massachusetts Supreme Judicial Court had handed down an opinion in the case of Commonwealth v. Garcia, ___Mass.___, 399 N.E. 2d 460 (1980), (set out in relevant parts at App. 78-86) in which, again, the same trial judge's charge defining reasonable doubt in terms of specific examples in jurors' private lives was in issue, but this time the court specifically held "that the charge...,like that in Ferreira, supra, is a constitutionally inadequate definition of 'beyond a reasonable doubt'...[and] that In re Winship, 397 U.S. 358 (1970), made retroactive by Ivan v. New York, 407 U.S. 203 (1972), mandates retroactive application of Ferreira." (emphasis supplied), even though Garcia had also not raised the errors at trial. Petitioners filed a petition for rehearing with the court below forthwith, pointing out that Garcia wholly eliminated the state procedure decisional underpinning of its opinion in holding Ferreira retroactive, and also was in conflict with the court's alternative holding, in that the "definition of" "beyond a reasonable doubt" was now specifically held to be "constitutionally inadequate." The petition for rehearing was promptly

granted, but "limited" "to the [single] question whether, in light of the decision in Commonwealth v. Garcia, the Massachusetts Supreme Judicial Court's failure to apply its decision in Commonwealth v. Ferreira retroactively and grant petitioners a new trial was arbitrary and capricious." [6]

Actually, after its holdings on unconstitutionality and the retroactivity of Ferreira, the state court ruled there was "overwhelming evidence of [Garcia's] guilt", therefore "harmless error", so his conviction was affirmed (App. 78-86), but that question is

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[6]The questions of the two courts' conflicting holdings on the fundamental unconstitutionality of the definition of "beyond a reasonable doubt" was not open upon rehearing, was not briefed or argued by the parties, and neither of the subsequent opinions of the Court of Appeals (App. 1-19) mentioned the issue. The court's initial alternative holdings in its first February 5, 1980, opinion that the definition passes constitutional muster is, therefore, unchanged, is in direct conflict with the Massachusetts Supreme Judicial Court, and is a duly presented question herein: that even if neither Ferreira nor Garcia existed, and there was no problem of reconciling them with Grace, is this jury instruction violative of due process in and of itself.

not involved here in any way. The Court is assured that "harmless error" does not lurk in the record to perhaps avoid reaching the stark constitutional questions presented or even to diffuse their fine focus.[7] After rebriefing and reargument, the Court of Appeals, while recognizing that "[t]he foundation for [its initial opinion] was severely eroded if not totally undermined by" the subsequent Garcia opinion (App. 5-19) did not then even reach the due process issue, but, in an unprecedented procedure, "resubmitted" the case to the state court,

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[7] That argument was never assayed by the respondents in any brief or argument in any court, and when the Massachusetts Supreme Judicial Court first affirmed petitioners' convictions on direct appeal in 1976, it prefaced its summary of the evidence by saying, "The evidence introduced by the Commonwealth and the defendants was highly contradictory." Two sentences further, after noting that the identity of the victim and the place and time of his dying were uncontradicted, the court conceded: *"...[T]he remainder of the evidence was sharply disputed, the Commonwealth's witnesses contending that the defendant[s were] present and shot the victim, and the defendant[s'] witnesses corroborating the defendant[s']...own testimony that [they were] elsewhere at the time of the shooting."* *See* Commonwealth *v.* Frank Grace, *370 Mass. 746, 747-748, 352 N.E. 2d 175, 176-177 (1976).*

specifically retaining jursidiction, however, as a matter of "comity", in order that the state court "in the first instance" could attempt to "reconcile" its refusal of relief to these petitioners with its other decisions (App. 5-19).[8] In the interim, between its Garcia opinion and these petitioners' asking for reconsideration per the Court of Appeals' order, the Supreme Judicial Court happened to hand down two other opinions on alleged errors in defining reasonable doubt, one of which particularly seemed only to compound the confusion, signal a retreat from the Garcia constitutional error holding, and assay a distinction between this case and Garcia. It was brought to the attention of the court below with the inquiry whether it did not sufficiently demonstrate the reconciliation the state court would attempt in this case to make unnecessary the ordered reconsideration. Petitioners were ordered to persevere before the state court.

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[8] Petitioners do not contend that the Court of Appeals did not have the inherent power to resubmit the case to the state court so that it could address the due process issue "in the first instance."

Characterizing that unique referral as a "rehearing" the state court then again denied the petitioners a new trial, now distinguishing their case because the jury instruction had "emphasized 'moral certainty' " and they had waived the constitutional error by not raising the "defect in the charge on reasonable doubt" at trial after it "had been disclosed in an opinion...published before the charge was given", so the due process issue was "not fairly presented" (App. 42-57). Petitioners, as they had been directed ("to keep the court advised"), immediately brought the state court opinion to the attention of the Court of Appeals, pointing out that the two words "moral certainty" were mentioned in passing only twice (only once, actually, with reference to the definition of "beyond a reasonable doubt"), not "emphasized", and were not a sufficient prophylactic to constitutional error anyway, and that the "waiver" distinction was specious because the error in denying "beyond a reasonable doubt" was not only not "disclosed" in the earlier cited case, but the definition had been <u>approved</u>, and that counsel for Ferreira and Garcia had also not thereafter raised the error at

trial but they had not been foreclosed from arguing the issue by any rule of "waiver", because, as the court had said in Garcia: "...we do not require that defense counsel foresee developments in the case law" (App. 78-86), and the rule of Ferreira was new law in Massachusetts, so the state court was anew "arbitrary and capricious" in requiring that only petitioners' counsel be somehow prescient. In a brief three paragraph Per Curiam opinion the lower court then "adhere[d]" to its original affirmance of the denial of the petition for habeas corpus, because "as explained" by the state court its "disposition" did "not...even approach" the constitutional dimension of Fourteenth Amendment error. No explication was proffered.

This petition for the issuance of a writ of certiorari is now timely and duly filed.

REASONS FOR GRANTING THE WRIT

The Court of Appeals holding here that "the jury charge as a whole...[was] essentially sound" and did not "amount to a denial of due process" is in direct conflict with holdings of the Massachusetts Supreme Judicial Court, clear dicta in

three opinions of the District of Columbia Circuit, a square holding of a District Court, and with the spirit, thrust and purpose of recent opinions of this Court. Such conflicts, traditionally, are sufficient reason to evoke this Court's clarifying interdiction, but this case has another even more catholic and compelling dimension warranting the Court's increasingly seiged attention. It is a clean and attractive vehicle to inject some understandable reality into the often semantic quagmire of the "constitutional jury instruction" rubric. The two errors in this charge, which petitioners maintain, at least in tandum, are of constitutional dimension, can be easily described and denominated and excised with surgical precision from the cherished essence of Due Process--evermore a clear and useful guide for every trial judge. Admittedly, the cleanly drawable lines this case permits have a narrow focus, would mark no fundamental changes, but they would assist clarity, be real, and be fair. Lastly (sadly, always lastly, in the rarified special advocacy these petitions demand) were the Court to grant certiorari and eventually hold due process was not

here done, the resulting new trial would be proof that justice can be done, and two young men maybe not imprisoned for life.

Here the trial judge defined proof beyond a reasonable doubt almost entirely in terms of the surety the jurors would have had in "important economic or social decisions" in their "own personal lives", such as "[w]hether to quit school or get a job, or to go on with your education or whether to get married or stay single, or whether to stay married or get divorced, whether to buy a house or continue to rent, or whether to pick up and move to another location and leave your friends for the offer of a better job." (App. 87-94). These homely examples were essentially the entire charge on the standard of reasonable doubt, undiluted by some of the other traditionally utilized equivalent concepts (App. 87-94), and it is the use of these examples as the essential explanation of the burden of proof that petitioners maintain was here a denial of due process. People decide whether "to get a job", "to buy a house", to "move", "or get divorced" oftentimes on no rational basis, but, at best, the decision is made by balancing

the pros and cons. That does not comport at all with the very special and far more rigorous standard of "proof beyond a reasonable doubt"--that is a preponderance of the evidence test, and that is error of constitutional dimension, contrary to the holding of the court below.

The Court has made it ineluctably clear that proof beyond a reasonable doubt is a constitutional command[9], and, ironically, perhaps the most specific recognition that the use of these very same examples, even by the very same judge, denies due process are two opinions by the Massachusetts Supreme Judicial Court. The first was the case that prompted these petitioners to seek a new trial, particularly when the jury charge in issue was almost word for word the same as theirs' (App. 63-77), and a new trial was ordered, even though the error was not couched specifically in

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[9]The Court held in In re Winship, 397 U.S. 358 (1970), on page 364: *"Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt...."*

constitutional terms.[10] The second case, however, handed down only a month after the First Circuit had held this very charge was not "a denial of due process",[11] specifically held that the use of these same specific examples in the same charge

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[10] In Commonwealth v. Ferreira, 373 Mass. 116, 364 N.E. 2 1264 (1977), the court said (App. 20-36). *"We think these examples understated and tended to trivialize the awesome duty of the jury to determine whether defendant's guilt was proved beyond a reasonable doubt...."*

"...We think the examples used here, far from emphasizing the seriousness of the decision before them, detracted both from the sericusness of the decision and the Commonwealth's burden of proof."

"Accordingly, we conclude that the judgment must be reversed. We think that there was reversible error both in the portion of the judge's charge dealing with sentencing and parole consequences and in his charge on the reasonable doubt standard....The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so...."

[11] The court below held that even though *"this use of the type of analogies invoked by the trial judge to help explain the reasonable doubt standard may in fact understate the degree of certainty required for a criminal conviction,...the ordinary life analogies...[did not have] a significantly... detrimental impact on appellants' rights...[or] on the trial to amount to a denial of due process."* Grace v. Butterworth, supra (App. 20-36).

by the same judge was error of constitutional dimension.[12] The only supporting authority cited was Bumpus v. Gunther, 452 F.Supp. 1060, 1061 (Mass. 1978). In that case, the trial judge had used only one example of "the major affairs of your life", whether or not to have heart surgery, and that was used to define "'moral certainty' theretofore used in defining proof beyond a reasonable doubt", and used some other explanations the court deemed erroneous, yet the court had little difficulty in holding that "the errors in explaining the prosecutor's burden

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[12]The court in Commonwealth v. Garcia, supra (App. 78-86), made two decisive holdings which impact on this case: *"...We hold that the charge in this case, like that in Ferreira, supra, is a constitutionally inadequate definition of 'beyond a reasonable doubt.' The use of specific examples 'trivializes' the standard of proof in the direction of the 'preponderance of evidence' standard. Cf. Bumpus v. Gunther, 452 F.Supp. 1060, 1061 (D.Mass. 1978). Although we find constitutional error in this charge, we must also consider whether this holding applies to the present defendant, whose trial took place some seven years before our decision in Ferreira, supra. We believe that In re Winship, 397 U.S. 368 (1970) made retroactive by Ivan v. New York, 407 U.S. 203 (1972), mandates retroactive application of Ferreira."*

of proof were of constitutional dimension...."[13] The court below did not mention this Bumpus v. Gunther case in holding in this case that the use of the examples did not have "a sufficiently devastating impact on the trial to amount to a denial of due process", but there is no doubt, at least now, that the First Circuit has considered well this

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[13]The court explained, citing In re Winship, supra, and other decisions of this Court, on pages 1062-1063:

"...Moreover, under the hypotheses stated to the jury, a decision 'either to have the operation or not to have it' could not be free from reasonable doubt since death might reasonably follow either course. Principally the analogy is inherently and necessarily confusing: to decide upon a future course of action, whether to have an operation, change a job, get a divorce, etc., is essentially different from accepting or rejecting the truth of a factual proposition such as a criminal indictment...."

"...."

"...Medical diagnosis is a form of opinion which seldom rests upon proof beyond a reasonable doubt. It is almost always based upon a preponderance of the evidence. A verdict in a criminal case is not an opinion or diagnosis comparable to a medical diagnosis....A much higher degree of certainty must exist in the minds of jurors before reaching a guilty verdict in a criminal case...."

patently conflicting holding, only to reaffirm its holding in this case. Eventually the District Court in Bumpus v. Gunther, supra, held that the erroneous instruction, "while of constitutional dimension [was] harmless beyond a reasonable doubt" because the evidence of guilt was "overwhelming" (not an issue here, as noted above) and, overall, the error did not significantly effect the entire trial, and the dismissal of the habeas corpus petition was recently affirmed, but on a slightly different "mode of analysis." Bumpus v. Gunther, ___F.2d___, No. 80-1114, (1st. Cir. Dec. 3, 1980). As to the heart surgery analysis, the court cited its opinion in this case ("...recently we refused to classify such a comparison as constitutional error..."), noted that "the ordinary-life analogies accepted in Grace were less momentous than the heart operation described here", and concluded that it did not "undermine the government's burden, elsewhere reiterated, to establish guilt beyond a reasonable doubt" (Slip opinion, at 10).

Both the opinion below and the District Court opinion holding the use of examples was constitutional error cited Scurry v.

United States, 347 F.2d 468 (D.C. Cir. 1965), cert. denied, 389 U.S. 883 (1967). The instruction there in issue had only referred generally to "the more important affairs of your own life", without the use of specific examples, in defining in part proof "beyond a reasonable doubt." No objection had been taken at trial to the instruction, so the court affirmed the conviction, but said that the analogy could not be equated with beyond a reasonable doubt and to do so was a denial of the defendant's rights,[14] rights this Court was of course later

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[14]The court explained, on page 470:

"...A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary.

"...Thus there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him. To equate the two in the juror's mind is to deny the defendant the benefit of reasonable doubt."

to hold were of constitutional dimension. The Scurry court again criticized similar general references to the jurors' important personal decisions in two later cases otherwise inapposite here,[15] and which were not cited by any of the courts below.

It can therefore be seen that the lower court's recent holding that the use of the examples in defining proof beyond a reasonable doubt did not deny the petitioners' rights to due process is in direct conflict with holdings of the Massachusetts Supreme Judicial Court, and the Massachusetts District Court, and dicta of the Court of Appeals for the District of Columbia. This Court should promptly resolve this still very new conflict in such an important area of criminal law[16] before it spawns increasing mischief.

The petitioners also maintain, as noted above, that the jury charge

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[15] United States v. Moore, 435 F.2d 113 (D.C. Cir. 1970), and United States v. Jacobs, 413 F.2d 1105 (D.C. Cir. 1969).

[16] The Massachusetts Supreme Judicial Court, for instance, noted in its Ferreira opinion, on page 128, "that no part of the usual instructions to juries in criminal cases is of more significance than the discussion of reasonable doubt."

contains a second error of constitutional dimension: the trial judge informed the jury of the parole and sentencing consequences of verdicts of first and second degree murder. He had done the same thing in Ferreira, and in ordering the new trial in that case the Supreme Judicial Court discussed at length the long-standing Massachusetts rule that a jury should not be informed of those consequences and concluded that Ferreira had been prejudiced as a result of the judge's ignoring that rule. It is hard to determine from the court's opinion whether that error alone was considered so fundamental that a new trial was mandated, because after expostulating the error and holding that the defendant was prejudiced thereby, the court said, on page 128:

> "We conclude, nonetheless that the defendant is to have a new trial.... Any doubt we may have on this score is resolved by the judge's charge on reasonable doubt."

(The court then went on to detail that second error.)

The authorities relied on by the state court were all opinions of that court, so it at first might seem that this is not error of constitutional dimension, however the court's conceptual basis smacks of due process considerations, and one section of the opinion in particular, in conjunction with a recent decision of this Court, well makes the point that this Court should now see the error as of constitutional import. The state court said, on page 125, of Ferreira quoting from Commonwealth v. Mutina, 366 Mass. 810, 817 (1975):

> "The principal argument for rejecting the practice of instructing juries as to the legal consequences of their verdicts in criminal cases seems to lie in the conviction that, in reaching their verdicts, jurors should be shielded from extraneous influences and should arrive at their verdicts only on a dispassionate consideration of the relevant and credible evidence presented to them in the adversary process.... To inform jurors of the consequences of their verdicts is apprently seen... as inviting result-oriented verdicts and possible devia-

> from the basic issues of a defendant's guilt or innocence. This process, if allowed without restriction, could lead to the jury's usurpation of the judge's sentencing prerogatives and duties and the Legislature's policy determining functions." (Emphasis supplied.)

Although the state court did not then have before it this Court's opinion in Taylor v. Kentucky, 436 U.S. 478 (1978), the conceptual underpinnings of the improprieties of informing the jury of the sentencing and parole consequences in verdicts of first and second degree and even the language used is the same as this Court's opinion. The court noted that the presumption of innocence, as a legal scholar would know, was but a way of describing the prosecutor's duty to prove guilt beyond a reasonable doubt, but that the jury may draw additional guidance from a separate instruction on the presumption. The Court ruled, on page 485 that a criminal defendant "is entitled to have his guilt or innocence determined solely on the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued

custody or other circumstances not adduced at trial"--what it also termed, on page 488 "extraneous considerations"--exactly the same phrase as the state court utilized in reversing in Ferreira. When the jurors were told about the sentencing and parole consequences of their verdict, this obviously injected "extraneous considerations" into the jury's decision; petitioners were not "judged solely on the basis of proof adduced at trial", and that was constitutional error.

The court below held (App. 20-36) alternatively, that the mention of parole and sentencing consequences was not of sufficient detrimental impact to constitute a denial of due process, and, since the defendants had not argued this error in their initial state appeal, the court agreed with the state court's initial holding that the error had been waived, and that procedural default precluded habeas corpus review even under the rule of Wainwright v. Sykes, 433 U.S. 72 (1977). Under this court's Sykes rule such a procedural default is not waived if petitioners can demonstrate both

"prejudice" resulting from the trial court's rule and "cause" for their failure to argue the issue in their initial appeal. The lower court here apparently accepted the fact that there was sufficient "prejudice" but, noting that this court had not defined either of the crucial terms in Sykes, held that petitioners had not demonstrated such a sufficient cause.

Petitioners maintain in the court below that until the Supreme Judicial Court's opinion in Ferreira, handed down after their initial appeal, informing a jury of the sentencing and parole consequences, had not as yet been held to be reversible error in Massachusetts, the state court's opinion notwithstanding. They maintain that such is the case, and that the Sykes rule should not be held to have waived this error.

The second alleged error in the charge is, petitioners maintain, of constitutional dimension. The charge in Garcia did not contain this error, so the state court has yet to specify that it is error of constitutional dimension but a reference to the court's opinion (App. 63-77) will demonstrate that the

court speaks in essentially constitutional tones. That being so, it is the long-established law in Massachusetts that there is no discretion to deny a new trial when "the original trial was infected with prejudicial constitutional error." Earl v. Commonwealth, 356 Mass. 174, 184 (1960). The most recent restatement of that rule of law, citing Earl , is Commonwealth v. Cook, Mass. Adv. Sh. (1980) 885, 891-892. Such a rule is not special to Massachusetts; it reflects "the long...settled" holdings of this court. See, Sandstrom v. Montana, __U.S. ___ 99 Sup.Ct. Rptr. 2450 (1979), and the cases cited on page 2460.

Even if the erroneous disclosure of the sentencing and parole consequences of the prospective verdict is not sufficient in and of itself to merit the new trial here sought, when considered in conjunction with the constitutionally erroneous instruction on proof beyond a reasonable doubt, the two errors should at least compel the new trial.

After the state court handed down its opinion in Commonwealth v. Garcia, Mass. Adv. Sh. (1980) 21, the First Circuit recognized, upon rehearing, that the state

court's opinion in that case, was, ostensibly, directly contradictory to its opinion affirming the denial of the motion for new trial for petitioners here. It uniquely ordered that petitioners bring that issue before the highest state court, and upon doing so, the Supreme Judicial Court reaffirmed its affirmance of the denial of petitioners' motion for a new trial. This time, however, it recognized that its Garcia opinion had removed two of the three attempts to distinguish this case from Ferreira, and this time endeavored to construct a new distinction. The point that the petitioners had raised upon the Garcia case having been handed down was that the state court was "arbitrary and capricious" in a "knowing refusal to apply precedent with an even hand", as the First Circuit had put it in its second opinion herein (App. 5-19).

The essence of the state court's last opinion herein evolves like this:

1. the standard of review on a collateral attack upon the denial of a motion for new trial based upon an error not previously raised is "to prevent a miscarriage of justice;" (App. 42-57).

2. that standard is "discretionary", involving an assessment of various "factors"; (App. 42-57).

3. that the "main defect in the charge on reasonable doubt [the use of specific examples] had been disclosed in an opinion of [the state court] published before the charge was given", i.e. in Commonwealth v. Bumpus (App. 42-57); and

4. that since there was "no objection or exception" taken to the error at trial and "experienced counsel failed to raise the point in his first motion for a new trial or in his first appeal", that "suggest[s] that it was not thought to be critical", therefore the court would "adhere to [its] prior decision."

The fundamental holding, obviously, is that since Bumpus made it clear that the use of specific examples was reversible error, the petitioners had waived the issue by failing to except or argue it in their first appeal. This was a newly devised effort to distinguish this case from Garcia, and this new theory of "waiver" is not valid--it must be held to be "knowing reversible error to apply precedent with an even hand."

Petitioners will admit that if the state court's opinion in Bumpus had set out what was to be its opinion in Ferreira and Garcia, that the "waiver" rule would foreclose the petitioners, but the lack of "even handedness", the "arbitrary and capricious" rulings of the state court are obvious when its opinion in Bumpus is examined. Bumpus was published in 1972 and petitioners trial was in 1974, but, counting a footnote, only seven sentences in the 12-page opinion are even arguably relevant to the instant issue and they are herein set forth in their entire context, pages 681-682:

> " 10. The defendant assigns as error certain aspects of the judge's instructions to the jury on reasonable doubt. The defendant argues that it was error for the judge to illustrate the meaning of reasonable doubt by comparing the degree of certainty required a juror would want before he decided to undergo major heart surgery. We have previously approved the practice of alluding to important decisions in the personal lives of jurors in an attempt to explain the concept of reasonable doubt.

> See Commonwealth v. Libby, 358 Mass. 617, 621. The inherent difficulty in using such examples is that, while they may assist in explaining the seriousness of the decision before the jury, they may not be illustrative of the degree of certainty required. It may be argued that problems concerning health and medical treatment, such as the illustration used in this case, are sometimes not susceptible to a decision based upon proof beyond a reasonable doubt. [The court's footnote 1. there inserted reads thusly: 'Such illustrations undoubtedly are of assistance to the jury, but the examples must be selected and described with care, for the reasons shown in the above discussion.'] Even assuming the validity of that argument in this instance, the instructions as a whole were comprehensive, were based upon traditional language, and adequately conveyed the concept of reasonable doubt to the jury. See Holland v. United States, 348 U.S. 121, 140."

It is, quite simply, incomprehensible how the Supreme Judicial Court could possibly infer from its opinion in Bumpus the slightest hint that it held or implied that the use of specific examples was reversible error. On the

contrary, any fair reading of Bumpus plainly says that the court approved of the use of specific examples, that they "undoubtedly are of assistance to the jury." Surely, it cannot be said that Bumpus constituted such a clear and definitive ruling of the state court that petitioners trial and appellate counsel should have perceived that the portion of the subject charge constituted reversible error such that their failure to object made out "waiver."

Ferreira made new law on this point in Massachusetts, subsequently, in Garcia, held to be error of constitutional dimension. The Commonwealth has never controverted that contention. All arguments accepted it as a "given" as, impliedly at least, the court below also did in its first two opinions in this case.

This rule of "waiver" was not applied to counsel in Ferreira nor in Garcia--only to counsel for petitioners. In its Garcia opinion, the state court pointed out that no objection or exception was taken to the errors in the charge (as none was taken here), and that it would only review that error and reverse if there were a "substantial likelihood that a miscarriage of justice has occurred", the same standard specified in the state

court's most recent opinion in this case (App. 42-57; 80). The very next sentence in the court's opinion (App. 78-86) reads as follows:

> "...Because we do not require that defense counsel foresee developments in the case law, we shall consider this issue, and review the propriety of the reasonable doubt charge according to the standard stated above ["miscarriage of justice".]"

The court then proceeded to hold that the "constitutionally significant error", "the use of specific examples" made "the charge in this case, like that in Ferreira, supra...a constitutionally inadequate definition of 'beyond a reasonable doubt'." Ferreira is the only case cited--it made new law. Why was not the waiver rule invoked against Garcia and the substantive question of whether a "miscarriage of justice" occurred there determined, but never reached in petitioners' case? The latter opinion arbitrarily never hazards an explanation. Would not the possibility of such a fundamental error as a "miscarriage of justice" be so transcendent that it would mandate overlooking any technical procedural rule of

waiver? That seems to be what the state court did in every other case except the Graces. It would seem that that action can surely be termed "arbitrary and capricious." The holdings in Ferreira and in Garcia are irreconcilable with the state court's opinion in this case, and display a "lack of even-handedness", sufficient that the writ should issue and a new trial be ordered, as is mandated by the Fourteenth Amendment.

C O N C L U S I O N

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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80-1825

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

FRANK GRACE, ET AL,
Petitioners

v.

FRED BUTTERWORTH, ETC., ET AL,
Respondents

A P P E N D I X
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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March 31, 1981

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

FRANK GRACE, ET AL,
Petitioners

v.

FRED BUTTERWORTH, ETC., ET AL,
Respondents

A P P E N D I X
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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March 31, 1981

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 79-1422

FRANK GRACE, ET AL,
Petitioners, Appellants

v.

FRED BUTTERWORTH, ETC., ET AL
Respondents, Appellees

SUPPLEMENTAL OPINION ON REHEARING

Before COFFIN, Chief Judge,
CAMPBELL and BOWNES, Circuit Judges

Daniel F. Featherston, Jr., with whom Robert A. Sherman was on brief, for appellants.

Barbara A. H. Smith, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, Stephen R. Delinsky, Assistant Attorney General, Chief, Criminal Bureau, and Robert V. Greco, Assistant Attorney General, were on brief, for appellees.

December 31, 1980

PER CURIAM. In our initial opinion upon rehearing of June 27, 1980, we refrained from deciding whether, as petitioners claimed, the Massachusetts Supreme Judicial Court had been so "arbitrary and capricious" in its application of state precedent in this case as to violate the fourteenth amendment. Instead, while retaining appellate jurisdiction, we

directed petitioners to put their claim before the state courts so that they might be given the opportunity to rule in the first instance on the issues presented.

In an opinion dated November 12, 1980, the Supreme Judicial Court, considering the Graces' petition for reconsideration of that court's 1978 decision, affirmed the denial of defendants' motion for a new trial. Commonwealth v. Grace, Mass. Adv. Sh. (1980) 2345. The court held that, at least in the procedural context in which petitioners' challenges to the jury instructions were made, reversal was essentially discretionary and dependent upon such factors as:

> "the weight of the evidence the seriousness of the deficiencies in the instructions taken as a whole, the extent to which the defects had been disclosed in opinions of this court or of the Supreme Court before the instructions were given, the prior opportunities of defense counsel to make the challenge on appeal and in postconviction proceedings, and whether the appeal is

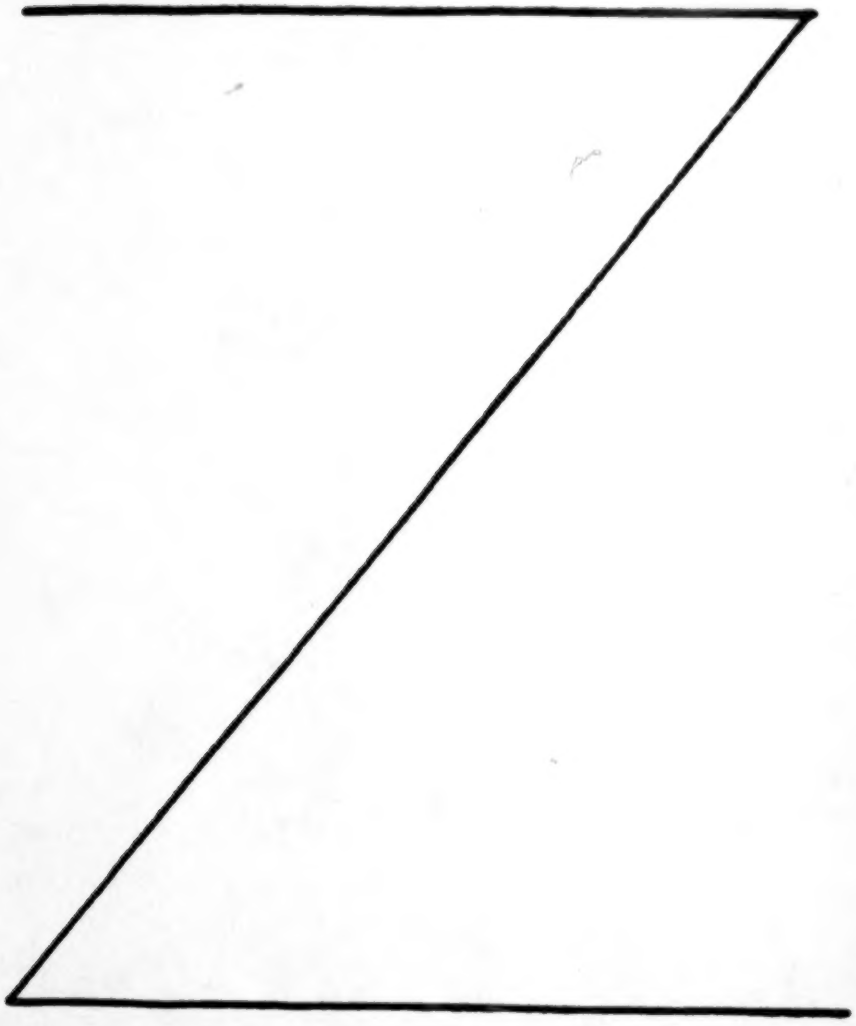
> subject to the special duty imposed on us by [Mass. G.L. c. 278] §33E [governing direct appeals but not defendants' motions for new trial]." Mass. Adv. Sh. (1980) at 2360.

Verdicts would be set aside only upon a showing of grave prejudice or substantial likelihood that a miscarriage of justice had occurred. Applying this standard, the court explained and adhered to its prior holding, and altogether rejected the Graces' most recent constitutional claim as affording any ground for relief.

On November 17, 1980, we invited the parties to file such supplemental memoranda, if any, as they wished in light of the recent opinion and order of the Supreme Judicial Court. After consideration of petitioners' memorandum and the Supreme Judicial Court's opinion, we conclude that petitioners have failed to demonstrate that the state court's disposition of the present case was such as to violate the standards of the fourteenth amendment. Even assuming, which we do not decide, that the judgments of the highest court of a state may ever be

declared unconstitutional by a lower federal court on the ground that has been advanced, we do not see that the disposition of the instant case, as explained by the Supreme Judicial Court, even approaches the irrationality or unfairness that would be required to sustain appellants' contention. We therefore adhere to our affirmance of the district court's denial of appeallants' petition for habeas corpus.

AFFIRMED.



UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 79-1422

FRANK GRACE, ET AL,
Petitioners, Appellants

v.

FRED BUTTERWORTH, ETC., ET AL
Respondents, Appellees

ON PETITION FOR REHEARING

Before COFFIN, Chief Judge,
CAMPBELL and BOWNES, Circuit Judges

Daniel F. Featherston, Jr., with whom Robert A. Sherman was on brief, for appellants.

Barbara A. H. Smith, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, Stephen R. Delinsky, Assistant Attorney General, Chief, Criminal Bureau, and Robert V. Greco, Assistant Attorney General, were on brief, for appellees.

June 27, 1980

CAMPBELL, Circuit Judge. This case comes before us following our allowance of appellants' petition for rehearing. See Fed. R. App. P. 40. On February 5, 1980, we affirmed the district court's denial of Frank and Ross Grace's petition for habeas corpus. Thereafter we granted this rehearing so as to consider the Graces' contention that a recent decision of the

Massachusetts Supreme Judicial Court (SJC), entered after we had initially heard oral argument, "fundamentally eliminates several of this court's grounds for affirmance..."[1] To explain the nature of appellants' argument and the supposed bearing of the state court's intervening decision on our own prior disposition of these habeas petitions, we shall briefly restate the procedural underpinnings of this case. In doing so we borrow heavily from our earlier opinion.

The Grace brothers stood trial together in 1974 in Massachusetts Superior Court for the murder of Marvin Morgan. The jury returned verdicts of guilty of first degree murder for Frank and second degree murder for Ross; the trial judge sentenced both to life imprisonment.

The Graces challenged their convictions on direct appeal to the Supreme Judicial Court, and with that appeal pending, also filed motions requesting a new

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[1] Our memorandum and order of February 26, 1980 granting the petition for rehearing limited argument "to the question whether, in light of the decision in Commonwealth v. Garcia, the Massachusetts Supreme Judicial Court's failure to apply its decision in Commonwealth v. Ferreira retroactively and grant petitioners a new trial was arbitrary and capricious."

trial on the basis of alleged newly discovered evidence. The trial judge denied the new trial motions, and the Supreme Judicial Court consolidated the appeals from the convictions and those denials, ultimately affirming both. Commonwealth v. Frank Grace, 370 Mass. 746, 352 N.E.2d 175 (1976); Commonwealth v. Ross Grace, 370 Mass. 759, 352 N.E.2d 183 (1976). Appellants then shifted their focus to the federal district court for Massachusetts, requesting relief under 28 U.S.C. §2254. That court dismissed the Graces' habeas petitions on March 27, 1978, and we affirmed. Grace v. Butterworth, 586 F.2d 878 (1st Cir. 1978).

On July 22, 1977, while the Graces' first habeas petitions were still pending before the district court, the SJC decided the case of Commonwealth v. Ferreira, 373 Mass. 116, 364 N.E.2d 1264 (1977). That case reversed a defendant's conviction for murder and ordered a new trial on the grounds that the trial judge had imporperly informed the jury of the possible parole and sentencing consequences flowing from verdicts of first and second degree murder, and had further erroneously

instructed the jury on the concept of proof beyond a reasonable doubt. This decision was, no doubt, of great interest to the Graces, as the same trial judge had presided over their trial and there had given instructions "substantially identical"[2] to those found deficient by the SJC in Ferreira. The Graces had not, in the various previous challenges to their convictions, voiced any arguments based on these portions of the jury charge. One month after the Ferreira decision, however, they moved for a new trial basically contending that the similarity between the charges, the state of the evidence and the overall circumstances existing in their case and in Ferreira mandated the granting of such relief. The trial judge

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[2] Grace v. Butterworth, No. 79-1422, slip op. at 3 (1st Cir. Feb. 5, 1980). The Commonwealth in its brief to the Supreme Judicial Court urging affirmance of the trial court's denial of the Graces' second motion for a new trial, see infra, described the relationship of the two charges as follows: "In fact, this same trial judge used substantially the same charge not only in Grace and Ferreira, but also in numerous other murder trials over which he presided." (Emphasis added.)

denied this second new trial motion without hearing; that denial was affirmed by the SJC which distinguished the two cases on several grounds.[3] Commonwealth v. Grace, ___Mass. ___, 381 N.E.2d 139 (1978). The Graces next petitioned the SJC for rehearing, contending that the court's proffered distinctions were specious and that the failure to grant them a new trial on a record "so similar" to that in Ferreira constituted a denial of due process. This petition was denied without opinion.

At this point, the Graces again looked to the federal courts for relief, filing the present section 2254 petition. This petition was denied by the district court, and, as previously pointed out, we affirmed that denial in an opinion entered February 5, 1980. On the question of the SJC's supposed "arbitrary and capricious" denial of the second new trial motion, we

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[3]The SJC noted that the Graces' "trial counsel took no exception to the reasonable doubt portion of the charge and that experienced appellate counsel failed to brief or argue the correctness of the charge on the first appeal"; that the judge's reasonable doubt instruction, "unlike the charge in Ferreira, emphasized 'moral certainty'" and "taken in the context of the entire charge did not amount to reversible error"; and that the Graces' failure to argue on appeal their trial exception to the judge's mention of parole and sentencing consequences worked a waiver of that claim of error.

concluded that "We need not weigh the merits of [that] court's attempts to distinguish [Ferreira and Grace]...since we find the procedural grounds on which the Supreme Judicial Court based its decision [i.e., the failure of the Graces to except to the reasonable doubt instruction or to argue the deficiency of the jury charge on appeal] sufficient to dispose of this issue." Slip op. at 4.[4] Although we recognized that in Ferreira too no exception had been taken to the challenged instructions, we held this not to be dispositive, noting that the "factors that may influence a state court to relax its procedural requirements in order to establish a principal of law for future cases do not require that court to waive those requirements when a party seeks retroactive application of a decision." Slip op. at 5.

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[4]We further found that appellants failed to demonstrate sufficient cause for their failure to press the parole and sentencing consequences issue on appeal; that the trial judge's mention of such consequences did not, in any event, violate due process; that the trial judge's definition of reasonable doubt did not so "infect[] the entire trial" as to violate due process; and that the trial judge had not, in his instructions, impermissibly shifted the burden of proof. None of these issues were reopened for argument in our granting of the Graces' petition for rehearing.

The foundation for that conclusion, however, was severely eroded if not totally undermined by a further decision of the SJC delivered on January 8, 1980 and brought to our attention in the Graces' present petition for rehearing. In Commonwealth v. Garcia, ___Mass.___, 399 N.E.2d 460 (1980), the SJC was again confronted with a challenge to a jury instruction on reasonable doubt delivered in a murder trial by the same trial judge who had sat on both Ferreira and Grace. The Garcia court noted that "There can be little question that the charge given in this case was very similar to that given in Ferreira." 399 N.E.2d at 471. The court, as a preliminary matter, agreed to overlook the failure of Garcia's counsel to object and except to the disputed portion of the charge, indicating that it did not "require that defense counsel foresee developments in the case law...." Id. (Garcia's trial had taken place some seven years prior to the Ferreira decision.) Next, the court concluded that "the charge in this case, like that in Ferreira...is a constitutionally inadequate definition of 'beyond a reasonable doubt'." 399 N.E.2d at 472. Further, and most important to

the present discussion, the SJC held that the United States Supreme Court decisions in In re Winship, 397 U.S. 358 (1970), and Ivan V. New York, 407 U.S. 203 (1972), mandated the retroactive application of Ferreira; this was so despite Garcia's failure to raise the alleged errors at trial.[5] Compare Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977). The SJC's only reference to its seemingly inconsistent handling of Grace was that it had not found the judge's instruction there, "in the context of the entire charge...to constitute reversible error," and that "Grace was an appeal from the denial of a motion for new trial," while Garcia involved additionally "a direct appeal." 399 N.E.2d at 472.

The Graces presently argue that our February 5, 1980, opinion finding no infirmity in the SJC's failure to grant them the benefits of its Ferreira ruling, based as it was on our recognition of that court's right in the circumstances to

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[5]The Surpeme Judicial Court continued by concluding that in light of the "overwhelming evidence" of Garcia's guilt, the erroneous instructions were harmless beyond a reasonable doubt. 399 N.E.2d at 473.

withhold retroactive application of that ruling, has lost all strength in light of Garcia. The Graces further contend that the retroactive application by the SJC of its Ferreira holding to Garcia following its steadfast refusal to similarly apply that holding to their case is "arbitrary and capricious", and thus violative of the fourteenth amendment. We have allowed the Graces the opportunity to brief and argue this last point on rehearing.

At the outset we are presented with a critical threshold question, namely whether the Graces have sufficiently exhausted their available state judicial remedies so as to render it appropriate for this court, in light of considerations of federal-state comity, to now answer their allegations of unconstitutional behavior on the part of the state's highest court. Picard v. Connor, 404 U.S. 270 (1971); 28 U.S.C. §§2254(b), (c).

We are mindful that in this circuit at least "exhaustion refers to remedies, not petitioners," Odsen v. Moore, 445 F.2d 806, 807 (1st Cir. 1971), and that a reading of the summary presented above of the Graces' repeated attempts to

secure relief in the state courts may make it first appear that the appellants have adequately presented their contentions to the necessary state tribunals. However, under the Supreme Court's decision in Picard v. Connor, 404 U.S. 270 (1971), "exhaustion of state remedies is required as a pre-requisite to consideration of each claim sought to be presented in federal habeas...." Pitchess v. Davis, 421 U.S. 482, 487 (1975) (per curiam) (emphasis added). It is not enough that the state has been presented with the general factual background of a petitioner's case or legal contentions related to that presently urged. Rather the state prisoner is required to first present to the state courts the "same claim" that he urges upon the federal court before he may properly seek relief in that latter forum. Picard, supra, 404 U.S. at 276 (emphasis added). Here, while the claim presently pressed by the Graces is certainly intertwined with and closely echoes their earlier voiced contention, we think that it "took on an entirely different character" after the Garcia decision and now "is in effect a new claim." Subilosky v. Commonwealth of Massachusetts, 412 F.2d 691, 693 (1st Cir. 1969).

In their original habeas petition in the present proceeding the Graces had urged that their case was identical in nearly all respects to Ferreira and that the state courts could not arbitrarily withhold the benefits of that decision from them. At this stage the relevant comparison concerned only those two cases, and as explained above, we had no difficulty in finding adequate the SJC's reliance on a procedural default as a basis for its decision to deny the Graces their requested relief. With the entry of the SJC's opinion in Garcia, however, granting as it did retroactive application of Ferreira despite defendants' failure to object at trial, the Graces' contention took on a rather different dimension. The focal point of their fourteenth amendment claim of arbitrary state court action now shifted from a comparison of their treatment with that accorded Ferreira to an uring that the state had, in a less than evenhanded manner, granted the retroactive benefits of its law to one party while capriciously withholding it from another. The relevant comparision is no longer solely between the Graces and Ferreira; it now also includes those brothers and Garcia.

While it is true that the SJC made passing reference to its handling of the Grace case in its Garcia opinion, see supra, it can hardly be contended that the state has been given " 'the initial "opportunity to pass upon and correct" [the instant] alleged violation[] of its prisoners' federal rights.' " Picard, supra, 404 U.S. at 275 (quoting Wilwording v. Swenson, 404 U.S. 249, 250 [1971]). Never has the state court been asked by the Graces to amplify its Garcia opinion or to contrast that case with the Graces' own situation. The petitioners have thus, in our view, framed a new constitutional challenge not yet presented to or addressed by the state courts.

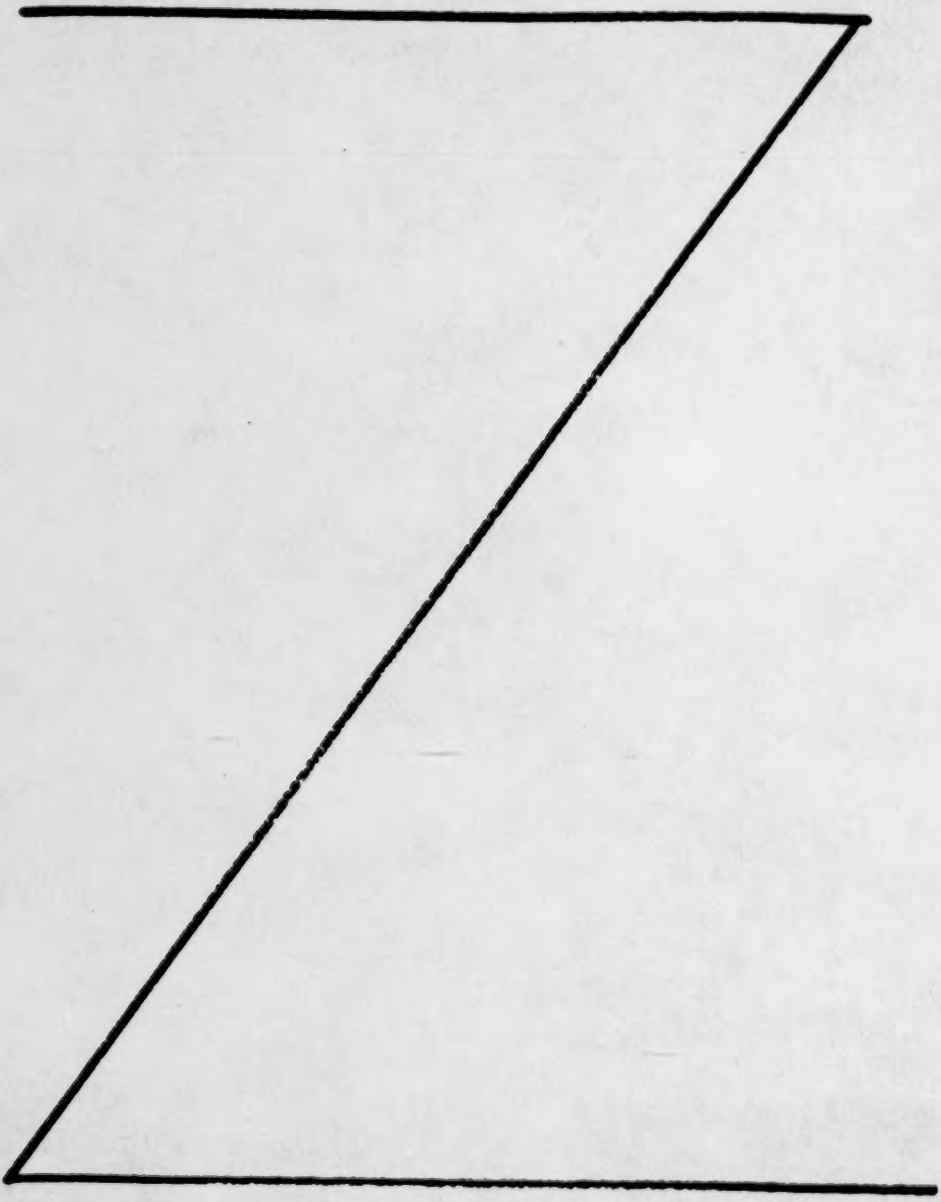
We believe that the usual reluctance of a federal court to scrutinize and possibly "upset a state court conviction without [granting] an opportunity to the state courts to correct [the alleged] constitutional violation," Picard, supra, 404 U.S. at 275 (quoting Darr v. Burford, 339 U.S. 200, 204 [1950], overruled on other grounds, Fay v. Noia, 372 U.S. 391 [1963]), is heightened in the present circumstances. The petitioning parties here are not simply framing a traditional

habeas claim that their trial was tainted by error of constitutional magnitude; instead they are accusing the highest court in the state of acting unconstitutionally itself in an apparently knowing refusal to apply precedent with an even hand. In the face of this argument, never yet raised in this case before any state tribunal, we believe that usual notions of comity and the recognized "proper respect for state functions," Preiser v. Rodriguez, 411 U.S. 475, 491 (1973), requires that we yield to the state in the first instance. The questions of the retroactivity of the Ferreira holding and the general impact and scope of the Garcia decision are of obvious great concern to the state. The Supreme Judicial Court should be granted an opportunity to explain more fully, if it so desires, the intended effect of Garcia and the nature and significance of the distinctions it perceives between that decision and the present case, before a federal court presumes to do so. We feel it appropriate and indeed necessary that the "substance of [this] federal habeas corpus claim... first be presented to the state courts." Picard, supra, 404 U.S. at 278.

We would generally, after finding a failure to exhaust state remedies, simply affirm the district court's dismissal of the section 2254 petition forcing the petitioners to completely begin their quest for relief anew. See, e.g., St. Pierre v. Helgemoe, 545 F.2d 1306 (1st Cir. 1976). We feel, however, that a different course is called for here. Considering the close relationship between the instant claim and that previously raised in their initial petition, and the fact that this case presents to this court a purely "legal" question divorced from any possible contested factual allegations, we believe that in the interest of fairness and expeditious disposition the better course is for us to retain jurisdiction while the Graces put their claim before the state courts. Cf. West v. Louisiana, 478 F.2d 1026, 1034 (5th Cir. 1973), vacated on other grounds, 510 F.2d 363 (1975). Since the Graces' claim hinges on the interpretation of a decision of the highest court of Massachusetts, we assume that efforts will be made to present the claim directly to that court through procedures deemed to be

suitable under the circumstances. The parties are directed to cooperate to present the matter forthwith and to keep this court advised as to their progress.

SO ORDERED.



UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 79-1422

FRANK GRACE, ET AL
Petitioners, Appellants

v.

FRED BUTTERWORTH, ETC., ET AL
Respondents, Appellees

Appeal From The United States District Court
For The District Of Massachusetts
[Hon. Walter Jay Skinner, U.S. District Judge]

Before COFFIN, Chief Judge
CAMPBELL and BOWNES, Circuit Judges

Daniel F. Featherston, Jr., with whom Robert A. Sherman was on brief, for appellants.

Robert V. Greco, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General and Stephen R. Delinsky, Assistant Attorney General, Chief, Criminal Bureau, were on brief, for appellees.

February 5, 1980

COFFIN, Chief Judge. Appellants, Frank and Ross Grace, were tried together in 1974 in Massachusetts Superior Court for the murder of Marvin Morgan. The government's case depended largely on the testimony of two eyewitnesses who identified the

Graces as the victim's assailants. The appellants each proffered an alibi defense.[1] The jury returned guilty verdicts of first degree murder for Frank Grace and second degree murder for his brother Ross, and the trial judge sentenced both to life in prison.

This appeal from the district court's denial of appellants' petitions for habeas corpus is the latest in a series of attempts to obtain relief from these convictions in both the state and federal courts. Appellants initially challenged their convictions on direct appeal to the Massachusetts Supreme Judicial Court. While that appeal was pending, they filed a motion for new trial on the basis of newly discovered evidence that they claimed would corroborate their alibis. The trial judge, concluding that the "new" evidence was available at the time of the trial and was merely cumulative, denied the motions. The Supreme Judicial Court consolidated the appeals from the convictions and from the denials of the new

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[1]The facts are more fully set out in the Supreme Judicial Court's opinions affirming the convictions. Commonwealth v. Grace, 370 Mass. 746, 352 N.E.2d 175 (1976); Commonwealth v. Grace, 370 Mass. 759, 352 N.E.2d 183 (1976).

trial motions and affirmed the trial court on both. Appellants then sought relief in the federal district court in Massachusetts pursuant to 28 U.S.C. §2254. The district court dismissed their habeas corpus petitions on March 27, 1978, and we affirmed that order, Grace v. Butterworth, 586 F.2d 878 (1st Cir. 1978).

While appellants' application for habeas corpus was pending in the district court, they filed a second motion for new trial in the Supreme Judicial Court. They argued in their new motion that the trial judge had denied them due process by improperly charging the jury with respect to reasonable doubt and punishment under various degrees of murder. The court denied this motion, and on September 29, 1978, the Supreme Judicial Court affirmed, Commonwealth v. Grace, ___Mass. ___, 381 N.E.2d 139 (1978). Appellants subsequently filed a second petition for habeas corpus which was also denied by the district court on July 24, 1979.

In this appeal, we are concerned solely with the appellants' challenge to the trial court's jury instructions. Appellants point to three aspects of the charge that

they regard as prejudicial: the judge's discussion of the different parole consequences of convictions for first and second degree murder, the judge's definition of reasonable doubt in terms of "serious unanswered questions", and the judge's explanation of reasonable doubt by means of analogies to important decisions in ordinary life.[2]

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[2]The trial judge defined reasonable doubt as follows:

" 'Beyond a reasonable doubt' does not mean that the Commonwealth has to prove a person's guilt to an absolute or mathematical certainty. There will hardly ever be a case heard by a jury that is so open and shut that there is no possiblity of the person being innocent. That is not what we mean.

"What we mean, rather, is that you have to be sure, after weighing the evidence, after discussing the testimony that you have heard amongst yourselves, after determining what part, all, part or none, of any witness's story you are going to believe. After drawing the inferences that you think are reasonable from the evidence that you believe, it means that you must be sure to a moral certainty that the defendant is guilty of the crimes, as I will explain them.

"If after evaluating the evidence in your minds, if you have any serious unanswered questions about the guilt of any defendant of a crime with which he is charged, then he must be given the benefit of that doubt and acquitted.

Following this instruction, he offered the following analogy:

"Now, I said you have to be sure. What we mean is that you have to be as sure as you would want to and probably have been when in your own lives you have had an important economic or social decision that you have had to make effecting [sic] your own personal lives.

(Footnote 2 continued)

"We all know that when we have to make that kind of a decision, that we can't be absolutely sure we are doing the right thing. But unless after weighing all the pros and cons we come to the conclusion that we are morally sure we are doing the right thing, then we don't act.

"For example, in your own lives at some time or other you may have had to make a decision whether to quit school, to get a job or to go on with your education; or whether to get married or stay single; or whether to stay married or get a divorce; whether to buy a house or continue to rent; or whether to pick up and move to another location and leave your friends for the offer of a better job.

"Now, whenever you have had to make that type of decision, you weigh the pros and cons carefully. And unless you are sure to a moral certainty that you are doing the right thing, you don't act. You don't make the change. It is that type of sureness that the law means by the expression 'beyond a reasonable doubt.' "

With respect to the differences between conviction for first and second degree murder, the judge said:

"For first degree murder, the sentence is life in prison; and that person is not eligible for parole. He stays there until and unless pardoned by the Governor and the Council.

"For second degree murder, the punishment is life in prison; and he is eligible--I don't say that he will be, but he is eligible for parole in 15 years."

Appellants' first argument concerns a case, Commonwealth v. Ferreira, ___Mass. ___, 364 N.E.2d 1264 (1977), decided by the Supreme Judicial Court after it had affirmed the appellants' conviction and the denial of their first new trial motion. In Ferreira, the court reversed a murder conviction and ordered a new trial because of the trial judge's jury instructions regarding reasonable doubt and probable cause, which were substantially identical to those given at appellants' trial. Appellants argue that it was constitutional error for the Supreme Judicial Court to deny their motion for new trial submitted one month after Ferreira was decided. Recognizing that a state court's misapplication of its own law generally does not raise a constitutional claim cognizable in a federal habeas corpus proceeding, Beck v. Washington, 369 U.S. 551, 554 (1969), appellants argue that the Supreme Judicial Court's denial of a new trial was "arbitrary and capricious", thus constituting invidious discrimination proscribed by the fourteenth amendment.

Since Ferreira was decided after appellants' trial and conviction, their

argument proceeds from the premise that the Supreme Judicial Court was obligated to apply that decision retroactively. From this starting point they argue that the court made a series of specious distinctions between the two cases that amounted to an arbitrary denial of their right to retroactive application of Ferreira. We need not weigh the merits of the court's attempts to distinguish the two cases, however, since we find the procedural grounds on which the Supreme Judicial Court based its decision sufficient to dispose of this issue.

As its first ground for affirming the trial court's denial of a new trial, the Supreme Judicial Court stated:

> "We note that trial counsel took no exception to the reasonable doubt portion of the charge and that experienced appellate counsel failed to brief or argue the correctness of the charge on the first appeal. 'It has been the unbroken practice both under the statute and at common law respecting motions for new trial not to examine anew the original trial for the detection of errors which might

> have been raised by exceptions taken at trial.' Commonwealth v. McLaughlin, 364 Mass. 211, 229 (1973)...." Commonwealth v. Grace, supra, ___Mass. at ____, 381 N.E.2d at ____.

Appellants argue that the court acted arbitrarily in imposing a procedural default against them, since in Ferreira no exception had been taken to the instructions, yet the court exercised its discretion to consider the issue. This argument is without merit. The factors that may influence a state court to relax its procedural requirements in order to establish a principle of law for future cases do not require that court to waive those requirements when a party seeks retroactive application of a decision. In Handerson v. North Carolina, 432 U.S. 233 (1977), the Court faced the argument that retroactive application of Mullaney v. Wilbur, 421 U.S. 684 (1975), would impose an undue burden on the administration of state judicial systems. In rejecting this argument, Justice White noted: "The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that

failure to object to a jury instruction is a waiver of any claim of error." 432 U.S. at 244 n.8. The Supreme Judicial court permissbily applied state procedural law by finding such a waiver in this case.

Appellants argue further that, even if Ferreira had never been decided, the instructions given by the trial judge would require a new trial as a matter of federal constitutional law. The district court found a basis in federal law for rejecting each of the three elements of the charge that appellants point to as reversible error. We will consider these in turn.

With respect to appellants' assertion of error in the trial judge's mention of punishment in his jury charge, the district court noted the finding of the Supreme Judicial Court that failure both to assign this instruction as error and to brief the question on appeal constituted a procedural default under Massachusetts law and applied the rule of Wainwright v. Sykes, 433 U.S. 72 (1977). Under Sykes, a procedural default precludes habeas corpus review unless the petitioner can demonstrate both "prejudice" resulting from the trial court's ruling and "cause" for his failure to comply with state procedures. Id. at 87. In applying the

Sykes test, the district judge concluded that appellants had met neither of these tests.

The Supreme Court did not define either of the crucial terms in Sykes, and this circuit has yet to put a definitive gloss on the meaning of "cause". The district court, however, relied on the definition applied by the Sixth Circuit in Canary v. Bland, 583 F.2d 887, 892 (6th Cir. 1978) (Merrit, J., concurring): "[C]ause means either that state procedural rules are inadequate or were unfairly applied or that neither the defendant nor his attorney could reasonably have been expected to know or appreciate the legal significance of the facts upon which the objection is based." We have rejected above the assertion that the state procedural rule was improperly or unfairly applied. Appellants also argue that there was no basis in Massachusetts law for reversal on the ground of this type of jury instruction prior to Ferreira. While we are less sanguine than the district court that prior cases had clearly presaged the holding in Ferreira on this point, counsel was, as the district judge noted, aware enough of

the possibility of error in this instruction to object to it at trial. We agree that appellants have failed to demonstrate sufficient cause for their failure to press this issue on appeal.[3]

Moreover, even if the principles of comity underlying the exhaustion requirement did not militate against exercise of the court's habeas corpus jurisdiction, section 2254 requires that a petitioner establish that he is in custody in violation of the Constitution or laws of the

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[3]We note that the Sykes Court, in creating a stricter standard than the Court had applied in Fay v. Noia, 372 U.S. 391 (1963), did not explicitly overrule that case, 433 U.S. at 88 n. 12. Sykes involved failure to object at trial, while Fay concerned alleged errors that had been preserved by objection at trial but had not been raised on appeal. The circuits have split over whether the Fay "knowing-and deliberate-waiver" rule is still applicable to objections taken at trial but not pressed on appeal. Compare Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977), with Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977). Since appellants have not argued that Fay applies to this issue and have addressed only the Sykes "cause and prejudice" test and since we find an alternative ground for affirming the district court on this point, we do not take sides in the controversy over the continuing vitality of Fay.

United States. Here, appellants are unable to cite any federal authority for thier assertion that mention of punishment in a jury instruction violates the Constitution. Taylor v. Kentucky, 436 U.S. 478 (1978), on which appellants rely as creating a constitutional principal that introduction of any "extraneous considerations", into the jury's deliberations constitutes a denial of due process, concerned the introduction of facts not adduced at trial that might dilute the defendant's presumption of innocence. We do not believe that the judge's mention of parole consequences had a similar detrimental impact here.

In response to appellants' second objection to the jury instruction--that the trial judge's use of analogies in defining reasonable doubt denied them due process--the district court assumed that the claim survived the Sykes test, but held that it failed to raise an error of constitutional magnitude. In Dunn v. Perrin, 570 F.2d 21, 24 (1st Cir. 1978), we noted that "comparison of reasonable doubt in criminal cases with the standard employed by jurors to make even the most significant decisions in their daily lives has been criticized for its

tendency to trivialize the constitutionally required burden of proof". See Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965) (equating reasonable doubt with important personal decisions "den[ies] the defendant the benefit of reasonable doubt"). The instruction in Dunn, however, like the charge in this case, also included reference to "refraining from action (as opposed to something like 'to be willing to act')", which, we noted, "has received widespread approval among the circuits." 570 F.2d at 25. See, e.g. United States v. Robinson, 546 F.2d 309, 313 (9th Cir. 1976); United States v. Leaphart, 513 F.2d 747, 750 (10th Cir. 1975); United States v. Richardson, 504 F.2d 357, 361 (5th Cir. 1974). We held that the combined effect of these two instructions was not a deprivation of the defendant's due process right to a reasonable doubt instruction.

Appellants argue that the "important decisions" analogies employed in the instruction in this case were more egregious than the mere mention of decisions pertaining to "the affairs of life" in Dunn. Although we reiterate our concern that use of the type of analogies invoked by the trial judge to help explain the reasonable doubt standard may in fact understate the degree of certainty required for a criminal

conviction, we do not believe that because the judge explicitly stated the ordinary-life analogies that were merely implicit in Dunn this aspect of the charge had a significantly more detrimental impact on appellants' rights. We do not exercise supervisory power over the state courts of Massachusetts; our review of their criminal proceedings is limited to those instances in which "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973). Because we find the jury charge as a whole to have been essentially sound, we do not believe that this explanation had a sufficiently devastating impact on the trial to amount to a denial of due process."[4]

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[4]Since we agree with the district court's conclusion on the merits of this claim, we do not decide whether the lack of any state court precedent constitutes sufficient "cause" for a defendant's failrue to object to a charge that is later held to be reversible error in a retroactively applicable decision. See Frazier v. Weatherholtz, 572 F.2d 994 (4th Cir. 1978).

Finally, with respect to appellants' assertion that the trial court impermissibly shifted the burden of proof, the district court held that they had failed to satisfy the exhaustion requirements of subsections 2254(b) and (c) because the issue had never been presented to the Massachusetts courts for decision.[5] Appellants argue that a habeas petitioner is not required to exhaust his avenues of state review if his return to state court would be a futile exercise. We agree that an attempt to secure a new trial in state court on this issue would be futile; the Massachusetts courts would certainly apply their contemporaneous objection rule to bar consideration of the issue. See Commonwealth v. Grace, supra, ____ Mass. at ____, 381 N.E. 2d at ____. The rule of Wainwright v. Sykes, supra, would then preclude habeas corpus review of this question, since appellants have offered no "cause" for their failure to object to this aspect of the charge at trial.

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[5]Indeed, appellants did not object to this portion of the judge's instructions at trial, nor did they raise the issue on direct appeal or in either of their motions for new trial or the appeals therefrom.

Although the district court did not address the merits of this claim, we see no error in this portion of the trial court's instructions. In Dunn v. Perrin, supra, which appellants cite as striking down a similar instruction, the trial judge had defined reasonable doubt as "such a strong and abiding conviction as still remains after careful consideration of all facts and argument." 570 F.2d at 23-24. We noted that this instruction imposed on the defendant the burden of establishing doubt in the jurors' minds. Id. at 24. In this case, in contrast, the trial judge said:

> "If after evaluating the evidence in your minds, if you have any serious unanswered questions about the guilt of any defendant of a crime with which he is charged, then he must be given the benefit of the doubt and acquitted."

This instruction is vastly different from that in Dunn, which in effect equated reasonable doubt with a "strong and abiding conviction." Here the judge's explanation did not refer to the function of defendants'

evidence and, when viewed in light of the entire charge, did not imply that they had the burden of establishing that degree the judge was attempting to define. See Tsoumas v. New Hampshire, No. 79-1333 (1st Cir. Dec. ___, 1979).

AFFIRMED

COMMONWEALTH V. FRANK GRACE (and a companion case)[1]

Bristol - September 12, 1978 - September 29, 1978

Present: Hennessey, C.J., Quirico, Braucher, Liacos & Abrams, JJ.

Practice, Criminal, New Trial; Charge to jury; Exceptions: failure to save exception; Appeal.

Motion for a new trial filed in the Superior Court on August 10, 1977.

The proceeding was heard by Brogna, J.

The case was submitted on briefs.

Daniel F. Featherston, Jr. for the defendants.

Peter B. Gay, Special Assistant District Attorney, for the Commonwealth.

ABRAMS, J. The defendants appeal from the denial of their second motion for a new trial. We have already affirmed their convictions and the denial of their first motions for new trials, Commonwealth v.

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[1] Commonwealth v. Ross M. Grace.

Grace, 371 Mass. (1976) (Frank)[a]; Commonwealth v. Grace, 371 Mass. (1976) (Ross)[b]. Although both defendants had obtained plenary review pursuant to G.L. c. 278, §33E, neither obtained approval from a single justice to pursue these appeals, as required by the statute. See G. L. c. 278, §33E. After exhaustive and plenary review under §33E, such approval is required. These appeals are, therefore, not properly before us. Since the Commonwealth has not argued the impropriety of these appeals being entered in this court without the approval of a single justice, we consider the issues raised to determine if the motions for new trials were correctly denied. We conclude that there was no error and affirm the order denying relief.

Both defendants claim that they are entitled to a new trial as a result of our holding in Commonwealth v. Ferreira, Mass. (1977).[c] They claim that the charge to the jury contained analogies to the jurors' daily lives in defining reasonable doubt and references to parole consequences of various verdicts and hence reversal is required. We disagree.

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[a]Mass. Adv. Sh. (1976) 1984.

[b]Mass. Adv. Sh. (1976) 2004.

[c]Mass. Adv. Sh. (1977) 1594.

We note that trial counsel took no exception to the reasonable doubt portion of the charge and that experienced appellate counsel failed to brief or argue the correctness of the charge on the first appeal. "It has been the unbroken practice both under the statute and at common law respecting motions for new trial not to examine anew the original trial for the detection of errors which might have been raised by exceptions taken at the trial." Commonwealth v. McLaughlin, 364 Mass. 211, 229 (1973), quoting from Commonwealth v. Dascalakis, 246 Mass. 12, 24 (1923). See Commonwealth v. Morgan, 280 Mass. 392, 394 (1932) (failure to except to portion of the jury charge cannot be raised as a matter of right on motion for new trial); Commonwealth v. Morrison, 134 Mas. 189, 190 (1883) (where defendant failed to except to portion of jury charge at trial, defendant had no ground to except to denial of motion for new trial).

Moreover, we note that the judge's charge concerning reasonable doubt in these cases, unlike the charge in Ferreira, emphasized "moral certainty" which is both a traditional and an

acceptable instruction. See Commonwealth v. Fielding, Mass. (1976);[d] Commonwealth v. Webster, 5 Cush. 295, 320 (1850). The use of analogies, taken in the context of the entire charge, did not amount to reversible error. Compare Commonwealth v. Coleman, 366 Mass. 705, 712 (1975), and Commonwealth v. Ferguson, 365 Mass. 1, 12 (1974), with Commonwealth v. Ferreira, supra at [e]. We find the instant cases more closely analogous to the Coleman and Ferguson cases than to the Ferreira case.

The charge on the parole consequences of possible murder convictions also does not require reversal. This court has subscribed to a "long-standing general rule that neither sentencing nor parole may appropriately be considered by the jury in reaching their verdict." Commonwelath v. Mutina, 366 Mass. 810, 823 n.12 (1975). See Commonwealth v. Goodwin, 356 Mass. 632, 633-634 (1970). The defendants

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[d]Mass. Adv. Sh. (1976) 2290, 2315-2316.

[e]Mass. Adv. Sh. (1977) at 1609-1610.

excepted to this portion of the charge but failed to argue this exception as error at the original appeal. Thus, this claim of error has been waived. Commonwealth v. Amazeen, Mass. n.1 (1978)[f] Commonwealth v. Kleciak, 350 Mass. 679, 681 (1966). See G.L. c. 278, §33D; S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1975). Cf. Commonwealth v. Grace, supra at [g] Commonwealth v. Roberts, 362 Mass. 357, 369 (1972).

While such remarks are better left unsaid, we think that not every comment on parole consequences by a judge necessarily required a new trial. See Commonwealth v. Burnett Mass. (1976)[h]

We have reviewed the charge as a whole and find that it stressed the duty of the jurors, the seriousness of their decision, moral certainty in defining reasonable doubt, and the Commonwealth's burden of proof. Therefore, we hold that a new trial is not mandated.

ORDER DENYING MOTION FOR NEW TRIAL AFFIRMED

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[f] Mass. Adv. Sh. (1978) 1025 n.1.

[g] Mass. Adv. Sh. (1976) at 2001-2002.

[h] Mass. Adv. Sh. (1976) 2171, 2174-2175.

COMMONWEALTH V. FRANK GRACE
(and a companion case[1])

Bristol. September 8, 1980 - November 12, 1980

Present: Hennessey, C.J., Braucher, Wilkins, Liacos & Abrams, JJ.

Practice, Criminal, New Trial, Appeal, Capital case. Exceptions: failure to save exception; Charge to jury. Constitutional Law, Substantial Federal question.

MOTION for a new trial filed in the Superior Court on August 10, 1977.

The proceeding was heard by Brogna, J.

After the decision reported at 376 Mass. (1978), the Supreme Judicial Court entertained a petition for reconsideration.

The case was submitted on briefs.

Daniel F. Featherston, Jr., for the defendants.

Francis X. Bellotti, Attorney General, Stephen R. Delinsky and Barbara A. H. Smith, Assistant Attorneys General, for the Commonwealth.

BRAUCHER, J. Before the United States Court of Appeals for the First Circuit the defendants claimed that this court, in Commonwealth v. Grace, Mass. (1978),[a]

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[1]Commonwealth v. Ross M. Grace.

[a]Mass. Adv. Sh. (1978) 2697.

"violated the fourteenth amendment by failing to apply in appellants' case the same rules that were announced in a later case claimed to be essentially indistinguishable," Commonwealth v. Garcia, ___Mass. ___ (1980).[b] See Grace v. Butterworth, No. 79-1422, Memorandum and Order (1st Cir., July 23, 1980). At the suggestion of the Federal court, the defendants now present that claim to us by a petition for reconsideration. Upon full consideration of the claim, we adhere to our 1978 decision.

1. The procedural posture. The defendant brothers were tried together in 1974 for a murder committed in 1972, and we affirmed their convictions and orders denying motions for new trial, considering the whole case on the law and the evidence pursuant to G.L. c. 278, §33E. Commonwealth v. Grace, 370 Mass. 746, 758 (1976). Commonwealth v. Grace, 370 Mass. 759, 762 (1976). Habeas corpus petitions were dismissed in Federal court, and the dismissals were affirmed. Grace v. Butterworth, 586 F.2d 878 (1st Cir. 1978).

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[b]Mass. Adv. Sh. (1980) 21.

Meanwhile, the defendants filed second motions for a new trial on the basis of our decision in Commonwealth v. Ferreira, 373 Mass. 116 (1977), and denial of those motions was affirmed in Commonwealth v. Grace, 376 Mass. (1978)[c]. A second habeas corpus petition was filed and denied in the Federal court, and the Court of Appeals affirmed. Grace v. Butterworth, ___F.2d___ (1st Cir. 1980)[d].

On the basis of our decision in Commonwealth v. Garcia, ____Mass. ___ (1980)[e], the defendants filed a petition for rehearing in the United States Court of Appeals. That Court granted a rehearing and decided "to retain jurisdiction while the Graces put their claim before the state courts." Grace v. Butterworth, ____F.2d ____, ____ (1st Cir. 1980)[f]. Later that Court adhered to that decision after the defendants had called its attention to our decision in Commonwealth v. Smith, ___Mass. ___ (1980)[g]

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[c]Mass. Adv. Sh. (1978) 2697.

[d]No. 79-1422 (1st Cir., Feb. 5, 1980).

[e]Mass. Adv. Sh. (1980) 21.

[f]No. 79-1422, slip op. at 8 (1st Cir. 6/27/80).

[g]Mass. Adv. Sh. (1980) 1683.

Grace v. Butterworth, No. 79-1422, Memorandum and Order (1st Cir., July 23, 1980). We treated the defendants' petition as a petition for rehearing, and the parties have filed briefs.

2. The Ferreira and Garcia cases. The same trial judge who presided over the Grace trial also presided over the trials in the Ferreira and Garcia cases, and he used substantially similar language in these and presumably in numerous other cases in instructing the jury on reasonable doubt. See, e.g., Commonwealth v. Ferguson, 365 Mass. 1, 11 (1974). In the Ferreira and Garcia cases, as in the Grace cases, counsel failed to object or except to this aspect of the charge. Both the Ferreira case and the Garcia case came to us on direct appeal, and we considered the issue pursuant to our powers under G.L. c. 278, §33E.

The evidence in the Ferreira case "demonstrated clearly that a vicious and unprovoked murder was committed and that one of two men, the defendant or Silva, committed that murder." There was "a classic duel of credibility: Silva testified that the defendant fired the shots, and the defendant testified that Silva did the shooting."

373 Mass. at 127. We considered the charge on reasonable doubt "in light of the fact that, as emphasized supra, the evidence of the defendant's guilt was not overwhelming." Id. at 128. We held that the judge's use of examples taken from the jurors' lives "understated and tended to trivialize" the jury's duty to determine whether guilt was proved beyond a reasonable doubt. We noted that we had "previously criticized the type of analogy drawn here." Id. at 129, and cases cited. Without any reference to constitutional requirements, we ordered a new trial. After a second trial we affirmed the defendant's conviction of murder in the first degree. Commonwealth v. Ferreira, ___Mass. ____ (1980).[h]

In the Garcia case we affirmed a conviction of second degree murder, holding that in view of the "overwhelming evidence of guilt" error in the charge on reasonable doubt was harmless. ___Mass. ____.[i] One judge dissented on the ground that an erroneous charge on reasonable doubt cannot be harmless. Id. at ____.[j] We first

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[i]Mass. Adv. Sh. (1980) at 40-41.

[j]Mass. Adv. Sh. (1980) at 44-45.

noted that in the absence of objection or exception we would reverse under §33E only upon a showing of grave prejudice or substantial likelihood that a miscarriage of justice has occurred. We distinguished our 1978 decision in the Grace cases as an appeal from the denial of a motion for a new trial rather than a direct appeal. We said that the charge in the Garcia case, like that in the Ferreira case, was "constitutionally inadequate," and that the Ferreira decision had retroactive application to a 1970 trial, emphasizing, however, that we would "scrutinize more carefully jury instructions given after the date of Ferreira." Id. at _____.[k]

3. Dispensing with exceptions. Before the effective date of Mass. R. Crim. P. 22, ____Mass.____ (effective July 1, 1979), we insisted in general that appellate review in criminal cases be based on a proper exception to the judge's ruling. We recognized, however, a "rarely used" power to set aside a verdict in order to prevent a miscarriage of justice when a decisive matter was not raised at the trial.

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[k]Mass. Adv. Sh. (1980) at 37-40.

Commonwealth v. Freeman, 352 Mass. 556, 564 (1967). Commonwealth v. Hughes ___ Mass. ___, (1980).[1] We have exercised the same power on collateral attack by writ of error. Connolly v. Commonweatlh, ___ Mass. ___, n. 9 (1979)[m]. See Commonwealth v. Hughes, ____Mass. ____ n. 1 (1980) (Liacos, J., dissenting);[n] cf. Gibson v. Commonwealth , ____Mass. _____(1979).[o] Our decision in the present case applies the same standard to collateral attack by motion for new trial, pursuant to Earl v. Commonwealth, 356 Mass. 181, 184 (1969). Commonwealth v. Grace, 376 Mass. ____ (1978).[p]

In Commonwealth v. Stokes, 374 Mass. 583 (1978), a case not subject to G.L. c. 278, §33E, because both indictment and conviction were for second degree murder, we held that it was appropriate to review the constitutional sufficiency of the judge's charge notwithstanding the

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[1] Mass. Adv. Sh. (1980) 1175, 1180.

[m] Mass. Adv. Sh. (1979) 678, 683 n.9

[n] Mass. Adv. Sh. (1980) 1175, 1185 n.1

[o] Mass. Adv. Sh. (1979) 692, 694-695.

[p] Mass. Adv. Sh. (1978) 2697, 2700.

failure of counsel to request an instruction or to object or except to the charge given. The charge in question was given before the decisions in Mullaney v. Wilbur, 421 U.S. 684 (1975), and Commonwealth v. Rodrigues, 370 Mass. 684 (1976); the Supreme Court had given the Mullaney case "complete retroactive effect" in Hankerson v. North Carolina, 432 U.S. 233, 241, 243 (1977); and we did not require "clairvoyance on the part of defense counsel." But we need not "apply a narrow and precise test"; the charge must "be examined in its entirety to determine whether the constitutional requirements have been met." We will "bring greater expectations, and consequently more careful scrutiny" to a charge given after the date of the Mullaney decision and particularly after the date of the Rodrigues, decision. Stokes, supra at 588-591.

When an appeal is subject to G.L. c. 278, §33E, we transfer to this court "the whole case for its consideration of the law and the evidence," and we may, "if satisfied that the verdict was against the law or the weight of the evidence,...or for any other reason that justice may require," order a new trial or direct the entry of a verdict of a lesser degree of guilt. The quoted provisions stem from an

amendment by St. 1939, c. 341, enacted in part to broaden the scope of our review of "capital cases" beyond the narrow limits enforced in the controversial Sacco and Vanzetti trials. See Commonwealth v. Brown, 376 Mass. , (1978).[q] The result has been to give us a discretionary power broader than that of a trial judge, though one to be used "with restraint." Commonwealth v. Mazza, 366 Mass. 30, 33 (1974); see Commonwealth v. Gricus, 317 Mass. 403, 404-407 (1944). In exercising that power we are not limited by the defendant's failure to object or except. See, e.g., Commonwealth v. Carballo, Mass. , (1980);[r] Commonwealth v. Corcione, 364 Mass. 611, 618 (1974); Commonwealth v. Myers, 356 Mass. 343, 346-347 (1969).

In the Ferreira and Garcia cases we exercised our power under §33E to review the charge on reasonable doubt in the absence of an objection or exception. In Gibson v. Commonwealth, Mass. , (1979),[s] where we denied postconviction

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[q]Mass. Adv. Sh. (1978) 2266, 2282-2283.

[r]Mass. Adv. Sh. (1980) 1775, 1976

[s]Mass. Adv. Sh. (1979) 692, 697.

relief, we said, "Even without any objection or exception we might have taken the point on direct appeal as a basis for ordering a new trial under G.L. c. 278, §33E." But the absence of an objection or exception is not irrelevant in a case under §33E; in Commonwealth v. Fluker, 377 Mass. 123, (1979)[t], we found that the state of the law on the issue argued was no longer uncertain at the time of trial, and we refused to review that issue in the absence of any requested instruction, objection or exception.

4. Discretion and consistency. Reviewing our recent cases on constitutional challenges to jury instructions in criminal cases, we find that the outcome has been influenced by at least the following factors: the weight of the evidence, the seriousness of the deficiencies in the instructions taken as a whole, the extent to which the defects had been disclosed in opinions of this court or of the Supreme Court before the instructions were given, the prior opportunities of defense counsel to make the challenge on appeal and in post-conviction proceedings, and whether the appeal is subject to the special duty

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[t]Mass. Adv. Sh. (1979) 156, 166-167.

imposed on us by §33E. In some cases our opinions have discussed a critical factor, such as "harmless error" in the Garcia case, as if it were a separate and independent issue; in others we have relied on several factors as elements in a composite decision. Where the Constitution does not require reversal, however, and in the absence of objection or exception, our decisions are consistent with the standard that we reverse only upon a showing of grave prejudice or substantial likelihood that a miscarriage of justice has occurred.

That standard calls for a decision that is essentially discretionary. Discretionary decisions by individual judges inevitably produce variations in result in substantially similar factual situations. See, e.g. Matter of Troy, 364 Mass. 15, 38-39 (1973) (bail determinations); Rosenberg, Judicial Dicretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 663 (1971). Statements explanatory of such decisions may serve "no sharp analytic purpose." See Gavin v. Commonwealth, 367 Mass. 331 342 (1975) (criminal sentences). At least one Justice of this court has found it difficult to rationalize our decisions.

See Commonwealth v. Hughes, Mass. , (1980)[u] (Liacos, J., dissenting); Commonwealth v. Garcia, Mass. , (1980)[v] (Liacos, J., dissenting). It is quite likely that other Justices, though not moved to write separate opinions, would have analyzed some of the cases very differently if they had been so moved. See Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges, 75 Colum. L. Rev. 359, 379-380 (1975); Schaefer, Precedent and Policy, 34 U. Chi. L. Rev. 3, 7-10 (1966). Although we have sometimes engaged in the dangerous practice of comparing discretionary decisions, we have recognized that "§33E review is not simply a process of 'color matching.' " Commonwealth v Coleman, 366 Mass. 705, 715 (1975). Contrast Griffin v. General Motors Corp., Mass. (1980),[w] where we declined to compare the size of jury verdicts in personal injury cases.

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[u]Mass. Adv. Sh. (1980) 1175, 1183.

[v]Mass. Adv. Sh. (1980) 21, 44.

[w]Mass. Adv. Sh. (1980) 937, 946.

5. The present case. Our 1978 decision in the Grace cases was not subject to §33E. See Commonwealth v. Smith, Mass. , (1980).[x] The charge was less deficient than those in the Ferreira and Garcia cases in that it emphasized "moral certainty." Nevertheless, if the case had been tried after the Ferreira decision and a proper exception had been taken we would doubtless have held that there was error. See Commonwealth v. Hughes, Mass. (1980).[y] But not only was there no objection or exception, experienced counsel failed to raise the point in his first motion for a new trial or in his first appeal. That appeal was argued after the Mullaney decision in the Supreme Court. The main defect in the charge on reasonable doubt had been disclosed in an opinion of this court published before the charge was given. Commonwealth v. Bumpus, 362 Mass. 672, 682 (1972), judgment vacated on other grounds, 411 U.S. 945 (1973), aff'd on rehearing, 365 Mass.

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[x] Mass. Adv. Sh. (1980) 1683, 1689.

[y] Mass. Adv. Sh. (1980) 1175, 1180.

66 (1974), reviewed on habeas corpus sub nom. Bumpus v. Gunter, 452 F.Supp. 1060 (D.Mass. 1978), No. 74-5197-G, Memorandum and Order denying habeas corpus (D.Mass. Jan., 8, 1980). The repeated failures of counsel to raise the point suggest that it was not thought to be critical.

Hence, so far as the point is one of State law, we adhere to our prior decision. So far as the question is whether, as a matter of Federal constituitonal law, the jury instructions on reasonable doubt require a new trial, we defer to the decision of the Court of Appeals in Grace v. Butterworth, F.2d , (1st Cir. 1980).[z] That Court reviewed the question at some length, and concluded: "Because we find the jury charge as a whole to have been essentially sound, we do not believe that this explanation [explicit statement of ordinary life analogies] had a sufficiently devastating impact on the trial to amount to a denial of due process." We agree with that conclusion. See Commonwealth v. Smith, Mass. (1980).[aa]

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[z]No. 79-1422, slip op. at 7-8 (1st Cir. February 5, 1980).

[aa]Mass. Adv. Sh. (1980) 1683.

6. The new constitutional claim. What we have said so far leads to the conclusion that our 1978 decision in the present case is distinguishable from our decisions in the Ferreira and Garcia cases, and that the issue is not fairly presented whether we have "proceeded so incoherently and capriciously, and with such lack of even-handedness, as to have violated the equal protection and due process standards of the federal Constitution." See Grace v. Butterworth, No. 79-1422, Memorandum and Order (1st Cir., July 23, 1980). Since, however, the Court of Appeals is free to take a different view of the questions we have discussed, and even to change its view as to what Federal constitutional law requires, and since it seems to have taken the defendants' claim seriously, we briefly consider the issue that would be presented if it were concluded that in our 1978 decision in the present cases we failed to apply the same rules announced more than a year later in the Garcia case. In our view that situation would not present a substantial Federal question, since the rules so announced were not necessary to the decision in the Garcia case. Moreover, a State court's misapplication of

its own law generally does not raise a constitutional claim cognizable in a Federal habeas corpus proceeding. Beck v. Washington, 369 U.S. 541, 554-555 (1969).

The order denying the defendants' motion for a new trial is affirmed on rehearing.

SO ORDERED.

LIACOS, J. (concurring). I agree with the statement of the court in part 6 of its opinion that in this case "the issue is not fairly presented whether we have 'proceeded so incoherently and capriciously, and with such lack of even-handedness, as to have violated the equal protection and due process standards of the federal Constitution.' See Grace v. Butterworth, No. 79-1422, Memorandum and Order (1st Cir. July 23, 1980)." Supra at [a]. Consequently, I join in that part of the court's opinion and, it being dispositive of the petition for reconsideration, concur in the result reached by the court.

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[a]Mass. Adv. Sh. (1980) at 2353.

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DANIEL F. FEATHERSTON, JR.
NORMAN F. LAZARUS
ROBERT A. SHERMAN

October 5, 1978

The Honorable Edward F. Hennessy
Supreme Judicial Court
New Court House
Pemberton Square
Boston, Massachusetts 02108

Re: Commonwealth v. Frank Grace
Re: Commonwealth v. Ross M. Grace

My Dear Chief Justice Hennessy:

In accordance with the provisions of Rule 27 of the Massachusetts Rules of Appellate Procedure, I submit herewith appellants' Petition For Rehearing in the subject cause, because the Court's opinion erroneously endeavors to construct distinctions between this case and Commonwealth v. Ferreira, Mass. Adv. Sh. (1977) 1594. There are no valid distinctions, and if a new trial is not also afforded the Graces, the Court itself thereby violates, unnecessarily, their Fourteenth Amendment rights.

The Court's opinion first says (Slip opinion 2), "that [the Graces'] trial counsel took no exception to the reasonable doubt portion of the charge:-- but no exception was taken in Ferreira either, yet that did not deter the Court's affording the required relief:

> "While defense counsel did not specifically except to this portion of the charge [definition of reasonable doubt], we may properly consider the issue under our §33E powers...." Id. at 1608, n. 11.

The Court next attempts to distinguish Ferreira by noting (Slip opinion, 2-3) "that the judge's charge concerning reasonable doubt in these cases, unlike Ferreira, emphasized 'moral certainty'...." That simply is not true. It is true that in reading his script in Ferreira Judge Brogna somehow skipped four words, two of which were "moral certainty", which he did include in his charge in this case, but it it totally incorrect to say that they were "emphasized." The relevant part of the Ferreira charge reads "...you must be sure to a moral certainty that the defendant is guilty...." (R. 4). That is the only passing

mention of the words "moral certainty" There was no emphasis at all. To say so is to misstate the record, and to attempt to construct a non-existent distinction between the two cases.

The Court's final attempt to avoid the relief here mandated is as invalid as the first two. The Court says (Slip opinion, 3), that the exception to the "charge on parole consequences" "has been waived" because it was not argued "as error at the original appeal." The two cases cited for that proposition do not so hold. They hold that "assignments of error not briefed are deemed waived." The subject error was not assigned "at the original appeal", nor, of course, could it have been, because it was not then error: the new rule of law in Ferreira was not promulgated until a year later. Commonwealth v. Burnett, Mass. Adv. Sh. (1976) 2171, which could perhaps be viewed as bearing the seed of Ferreira, was not even handed down until after the Graces' convictions were affirmed by this Court.

Finally, I take personal objection to the uncalled for "shot" taken at my professional competence in the first paragraph of the Court's opinion: my ostensible failure to obtain "approval from a single justice to pursue these

appeals. The Court completely overlooks the fact that the Court itself, on its own motion took this case on direct appeal. That, surely, is recognition that the appeal presents "a new and substantial question", as per G.L. c. 278, §33E, and obviated my seeking any additional approval "from a single justice." The Court's own action waived any such "make work project", but the opinion ignores that fact. It is unfair to me, and advances nothing to observe that the appeal is "not properly before us"--the Court itself brought up the appeal.

I can fully appreciate the Court's quite natural reluctance, proper for various reasons to order a new trial in any criminal case, particularly, perhaps, a first-degree murder case four and a half years old, but on this record that result simply cannot be avoided. For the Court to deny the Graces the relief afforded Ferreira on a record so similar the names are about the only difference, also needlessly injects constitutional error into this case: it starkly deprives them of due process of law, a right guaranteed them by the Fourteenth Amendment to the Constitution of the United States of America.

The Court is respectfully requested to withdraw its initial opinion. Should there, perhaps, be some concern about the precedential mischief which might be worked by an opinion granting the Graces a new trial, the Court can easily avoid that by assigning the case to the summary disposition calendar (the Court may recall that the Commonwealth joined the appellants in a motion asking that the case be so assigned in the first instance), and simply order a new trial without an opinion.

Respectfully yours,

/s/ Daniel F. Featherston, Jr.

Daniel F. Featherston, Jr.

CC: Special Asst. District
Attorney Peter B. Gay

DELIVERED BY HAND

Relevant portions of Commonwealth v. Ferreira, 37[illegible] Mass. 116 (1977)

The defendant also testified about statements he made to the police, or in their presence. On direct examination, he testified that after he was apprehended he was asked where the owner of the Cadillac was and disclosed that Silva was on the third floor of the house across the street.[6] He further testified that he requested Detective Pedro have the gun and his hands checked, but that no tests were run on his hands. On cross-examination, the Commonwealth elicited that, after the defendant had been advised of his rights at the police station, Silva came into the station and accused him of killing Officer Ruggiero. The defendant responded, "Is that right, Joe?" On redirect examination, the defendant was asked by his counsel to explain why he did not give the police a statement at the station, but this question was exluded and counsel excepted.[7]

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[6]The defendant did not recall asking Detective Carey not to tell Silva that he told him where Silva was, or to forget that he had advised him of his rights.

[7]On cross-examination, the Commonwealth attempted to impeach the defendant by introducing his record of prior convictions. None of his prior convictions appears to have involved the use of firearms.

Other defense witnesses. Diane Carrita, the woman who lived with the defendant, testified that she had accompanied the defendant to Silva's apartment on the day on which Silva testified that the defendant had left the box of bullets there, but said that she had not seen the defendant ever bring bullets there.

Theredore Souza testified that he was the owner of the Charter Arms .38 caliber gun. He stated that he knew both the defendant and Silva, but gave neither of them the gun. He agreed that he might have left it at the service station he owned on Pleasant Street, which both the defendant and Silva frequented.

1. The Charge.

The judge charged the jury in substance that, if they found the defendant guilty of murder in the first degree, he would be sentenced to life imprisonment witout eligibility for parole, while if they found him guilty of murder in the second degree, he would also be sentenced to life imprisonment but would be eligible for parole after fifteen years,[8] and defense counsel excepted.

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[8]The judge's full charge on this point was as follows: "As I said before, there is one crime of murder; there are two degrees. They differ principally in the punishment. And because you, in effect, have to determine the degree of murder, effectively impose the punishment, I think it only fair that I tell you what the difference in the punishment is.

This portion of the charge was error.[9]

We have long held that the sentencing consequences of a verdict may not be submitted to the jury because the jury's function is to reach a verdict based solely on the evidence presented to them considered in light of the judge's charge to them, concerning the applicable legal standards. The degree of murder is for the jury to determine. G.L. c. 265, §1. However, the jury's function in this respect is not to weigh possible verdicts with an eye toward dispensing mercy in certain cases or imposing heavier penalties in others. Rather, the jury's function is solely one of fact finding with respect to the legal standards regarding innocence or guilt. The jury has a duty to return a verdict of guilty of

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8 (continued)

"A person convicted of first degree murder now, under recent Supreme Court decisions and agreed in this case, will be sentenced to life imprisonment without eligibility for parole. He spends the rest of his life in prison except if he is pardoned by the Governor and the Council.

"A person convicted of second degree murder is similarly sentenced to life imprisonment. He is eligible--I don't say he has to make it--but he is eligible for parole in fifteen years."

[9]The Commonwealth concedes in its brief that this portion of the charge was erroneous but argues that the error was harmless.

murder in the first degree only if they conclude that the evidence before them establishes beyond a reasonable doubt that the defendant committed a murder falling within one of the three statutory categories of murder in the first degree. Conversely, the jury have a duty to return a verdict of murder in the second degree only if they conclude that the evidence before them establishes beyond a reasonable doubt that the defendant committed a murder which was not proved beyond a reasonable doubt to be murder in the first degree. Commonwealth v. Dickerson, 372 Mass. 783 (1977).

If the jury could properly exercise a dispensing function, an argument might plausibly be made that they should be instructed as to the practical consequences of their verdicts.However, we firmly rejected that view in Dickerson, in reaching a result entirely consistent with our long-standing rule that sentencing and parole considerations are not matters within the jury's proper sphere.

"The principal argument for rejecting the practice of instructing juries as to the legal consequences of their verdicts in criminal cases seems to lie in the conviction that, in reaching their verdicts, jurors

should be shielded from extraneous influences and should arrive at their verdicts only on a dispassionate consideration of the relevant and credible evidence presented to them in the adversary process.... To inform jurors of the consequences of their verdicts is apparently seen...as inviting result-oriented verdicts and possible deviation from the basic issues of a defendant's guilt or innocence. This process, if allowed without restriction, could lead to the jury's usurpation of the judge's sentencing prerogatives and duties and the Legislature's policy determining functions." Commonwealth v. Mutina, 366 Mass. 810, 817 (1975).

In Mutina, we reversed a conviction of murder in the first degree, holding that, for all trials and retrials after the date of that opinion, a defendant is entitled to an instruction regarding the consequences of a verdict of not guilty by reason of insanity if a timely request for such instruction is made. We stressed, however, that we did not depart from "the long-standing general rule that neither sentencing nor parole may appropriately be considered by the jury in reaching their verdict." We concluded that the

jurors might well have based their verdict not on the evidence, but on a desire to ensure the continued confinement of the defendant. Instructing the jury on the consequences of a verdict of not guilty by reason of insanity may, in an appropriate case, afford the same protection as does the application of the general rule that sentencing consequences are not within the jury's province: it prevents extraneous factors from interfering with or even totally eclipsing the jury's deliberations with respect to the evidence before them.

"[U]nless otherwise provided by statute, the jury in this Commonwealth have no responsibility for, or authority to recommend, attempt to influence, or otherwise participate in any way in, the sentencing of a defendant whom they have found guilty. It necessarily follows that the jury have no right to determine the crime of which the defendant is guilty, or the degree thereof, on the basis of the penalty which they believe the defendant should or might receive." Commonwealth v. Mutina, supra at 824-825 (Quirico, J., concurring in part and dissenting in part). See Commonwealth v. Goodwin, 356 Mass. 632 (1970); Commonwealth v. McNeil, 328 Mass. 436 (1952).

The general rule is so well established that the only real question is whether there was reversible error here. We turn now to that issue.

In Commonwealth v. Burnett, 371 Mass. 13 (1976), we considered a charge similar to the one now before us. We stated in that case, at 16: "The trial judge is not to explain to the jury what parole conditions are for murder in the first degree or what they are if the defendant is found guilty of murder in the second degree. Such instructions tread closely to reversible error and are to be avoided." We concluded that the charge was not reversible error for three reasons. First, defense counsel did not except to that portion of the charge and, while we could consider the issue under our §33E powers, when the error was not brought to the judge's attention, we would reverse only on a showing of "grave prejudice." Second, defense counsel had commented on sentencing in his closing argument, and the judge may have considered a curative instruction necessary. Third, the Commonwealth had presented a very strong case of murder in the first degree against the defendant.

None of these three factors is present in this case. Defense counsel took timely exception to the charge arguing that the charge enhanced the possibility that the jury would return a verdict of murder in the first degree because they might reasonably view the unprovoked murder of an on-duty police officer with particular revulsion and be guided in their deliberations by that revulsion rather than by the evidence before them.

The evidence here demonstrated clearly that a vicious and unprovoked murder was committed and that one of two men, the defendant or Silva, committed that murder.[10] While there was evidence from which the jury could have concluded that the defendant was guilty of murder in the first degree, we think that the question was not so free from doubt as to render the charge harmless beyond a reasonable doubt.

We have in this case a classic duel of credibility: Silva testified that the defendant fired the shots , and the defendant testified that Silva did the shooting. While the jury could have chosen to accept Silva's testimony rather than that of the defendant, Silva's testimony was hardly disinterested, as he

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[10]There was no evidence of joint enterprise, and the judge accordingly gave no instruction on the law thereof.

was also under indictment for the murder at the time of the trial. The Commonwealth's other evidence did tend to favor the proposition that the defendant had fired the shots rather than Silva but cannot be said to have pointed decisively to the defendant.

Nor does the evidence in this case compel the conclusion that if the defendant did fire the shots he was guilty of murder in the first degree. There was extensive testimony that the two men had been drinking very heavily for a period of seventeen hours prior to the shooting. The judge quite properly charged the jury that, while intoxication would not excuse the crime of murder, if they found that the defendant had fired the shots, they might conclude that his degree of intoxication was such that he was incapable of forming the requisite deliberate premeditation to support a conviction of murder in the first degree. See Commonwealth v. Taylor, 263 Mass. 356, 363 (1928). The jury returned after three hours' deliberation to request that the judge clarify the distinction between murder in the first and second degrees. We are unable to conclude that the judge's charge on sentencing consequences did not have a prejudicial impact on the jury.

It can be argued that, as a result of the erroneous instructions as to sentencing this court should order that the verdict as to murder in the first degree should be vacated and a verdict of guilty of murder in the second degree should be entered. G.L. c. 278, §33E. See Commonwealth v. Rego, 360 Mass. 385, 393-397 (1971). The premise is persuasive that the impact of this aspect of the charge could be prejudicial only as to the degree of murder. The reasoning here is that the jury's verdict establishes conclusively that they decided that the defendant, rather than Silva, committed the murder, and that the erroneous instructions could not have affected their deliberations in reaching that conclusion.

We conclude, neverthless, that the defendant is to have a new trial, rather than a reduction of the verdict to murder in the second degree. Any doubt we might have on this score is resolved by the judge's charge on reasonable doubt.[11]

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[11] While defense counsel did not specifically except to this portion of the charge, we may properly consider the issue under our §33E powers. Commonwealth v. Burnett, 371 Mass. 13 (1976). Viewing the charge in its entirety, we must conclude that there was grave prejudice to the defendant.

We consider this portion of the charge in light of the fact that, as emphasized supra, the evidence of the defendant's guilt was not overwhelming. We also consider that no part of the usual instructions to juries in criminal cases is of more significance than the discussion of reasonable doubt.

The judge charged the jury that "[y]ou must be as sure as you would have been any time in your own lives that you had to make important decisions affecting your own economic or social lives. You know, any time that you had to make an important decision, you couldn't be absolutely, mathematically sure that you were doing the right thing--you weigh the pros and cons; and unless you were reasonably sure beyond a reasonable doubt...." He went on to give examples of these "important" decisions: "[W]hether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are, and go someplace else for what you hoped was a better job."

We think these examples understated and tended to trivialize the awesome duty of the jury to determine whether the

defendant's guilt was proved beyond a reasonable doubt. We have previously criticized the type of analogy drawn here. See, e.g., Commonwealth v. Fielding, 371 Mass. 97, 116-117 (1976); Commonwealth v. Gilday, 367 Mass. 474, 497-498 (1975); Commonwealth v. Coleman , 366 Mass. 705, 712 (1975); Commonwealth v. Ferguson, 365 Mass. 1, 12 (1974); Commonwealth v. Bumpus, 362 Mass. 672, 681-682 (1972), judgment vacated and remanded on other grounds, 411 U.S. 945 (1973), aff'd on rehearing, 365 Mass. 66 (1974); Commonwealth v. Libby, 358 Mass. 617, 621 (1971). The charge now before us is notably bereft of the saving graces present in charges which we have previously criticized but found not to be reversible error when taken in their entirety.

In Commonwealth v. Bumpus, supra at 682 in which the sole example was a reference to the degree of certainty a juror would want in deciding whether to undergo major heart surgery, we stated: "The inherent difficulty in using such examples is that, while they may assist in explaining the seriousness of the decision before the jury, they may not be illustrative of the degree of certainty required." We

think the examples used here, far from emphasizing the seriousness of the decision before them, detracted both from the seriousness of the decision and the Commonwealth's burden of proof.

Accordingly, we conclude that the judgment must be reversed. We think that there was reversible error both in the portion of the judge's charge dealing with sentencing and parole consequences and in his charge on the reasonable doubt standard. While this charge goes unusually far afield, we think the better course is that all references to examples taken from the jurors' lives should be avoided. We have previously expressed this "wish." Commonwealth v. Coleman, 366 Mass. 705, 712 (1975). The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of

undoing private mistakes; a verdict of guilty is frequently irrevocable.[12]

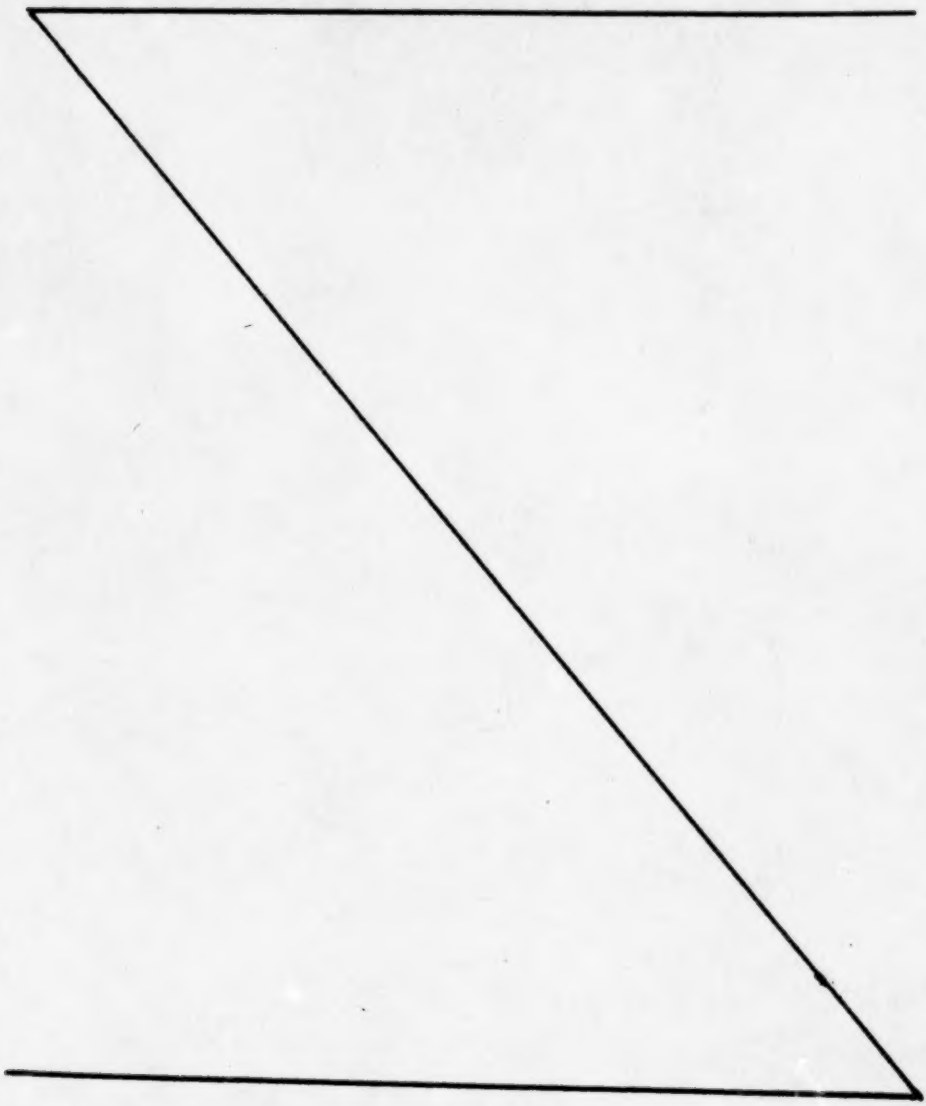
2. Limitation of Redirect Examination

The defendant raises one further issue which we consider, since the issue may arise on retrial of this case. On cross-examination, the Commonwealth elicited testimony from the defendant that while he was in custody at the police station and after he had been advised of his Miranda rights Silva, who was also in custody, accused the defendant of killing Officer Ruggiero, to which the defendant replied, "Is that right, Joe?" On redirect examination, defense counsel asked the defendant to explain why he gave no statement to the police. The question was excluded; defense counsel excepted, but made no offer of proof.

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[12]We reiterate the admonition we expressed in Commonwealth v. Therrien, 371 Mass. 203, 209 (1976), quoting from Commonwealth v. Gerald, 356 Mass. 386, 390 (1969): "Explanation of 'reasonable doubt,' we think, is usually best made in close reliance on the time-tested language of Commonwealth v. Webster, 5 Cush. 295, 320 [1850]." It is fair to say that unimpeachable instructions as to reasonable doubt which we have reviewed in many other cases have invariably been based on the key phrases of Webster, as modified and unquestionably improved by some variations from the exact language of the Webster case.

We think that if this case is retried, this evidence should be admitted, subject to the making of an appropriate offer of proof. The Commonwealth argues that since under Doyle v. Ohio, 426 U.S. 610 (1976), a defendant's silence during custodial interrogation is not competent or material



substance of questions, answers, and court rulings. Although the judge did not direct that pauses be allowed for translation while other witnesses testified, the interpreter said she translated for Garcia at the same speed as the witnesses were speaking. It is evidence from the record that Garcia had an interpreter if and when he needed one, and that his rights were fully protected.

5. Jury instructions. Garcia alleges three errors in the charge to the jury: inadequate instructions on the meaning of "reasonable doubt"; failure to instruct the jury that the Commonwealth bore the burden of proving that his confession was voluntary; and improper instructions on the standard by which to assess the voluntariness of his confession.

a. Reasonable doubt. The defendant alleges that the definition of reasonable doubt does not comport with our decision in Commonwealth v. Ferreira, 373 Mass. 116, , (1977).[o] There can be little question that the charge given in this case

[o]Mass. Adv. Sh. (1977) 1594, 1608-1610).

was very similar to that given in Ferreira.[9]

Before considering the propriety of the present charge, however, we note that

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[9]The judge charged the jury that: "The words, 'beyond a reasonable doubt,' on the other hand, so mean that after hearing the evidence, after discussing it among yourselves, after determining what part, if any, of any witness's story you're going to believe, after determining what inference you're going to draw from the evidence, you believe, all twelve of you, that you must be sure, as sure as you want to be when in your own lives you had to make important decisions involving your personal, your social or your economic lives. For example, I am sure that all of you at some time or another in your lives have had to decide whether to quit school or to go on with your education, whether to get married, whether to stay single, whether to get divorced or stay married; whether to buy a house or nor, whether to increase the mortgage on the house or not, and when you have had to make this type of a decision, you have weighed the pros and cons. You have carefully thought about it, and if there was a reasonable doubt in your mind that you were not doing the right thing, then you didn't do it. I am not talking about decisions that you have to make of a routine nature, like what color tie to put on in the morning, whether to wear a blue shirt, or what color beads to wear with a particular dress, or whether to buy a Ford or a Chevrolet; I'm talking about more important decisions in your own lives where you weighed the pros and cons seriously and knowing that it is impossible to be absolutely sure, for example, that you were doing the right thing when you decided to get married or get divorced, to buy a house, but if you had a reasonable doubt in your mind that this was not the right thing to do, then you didn't do it, this is what the law means by the expression, 'beyond a reasonable doubt,' that type of sureness that compelled you to act when you, yourself, had to make important decisions."

defendant's counsel did not object to that portion of the charge which defined reasonable doubt. In the absence of an objection and exception, although this court may still find reversible error under G.L. c. 278, §33E, it will do so only "upon a showing of grave prejudice or substantial likelihood that a miscarriage of justice has occurred." Commonwealth v. Roberts Mass. , - (1979).[P] Commonwealth v. Burnett, 371 Mass. 13, 16 (1976).[10] Because we do not require that defense counsel foresee developments in the case law, we shall consider this issue, and review the propriety of the reasonable doubt charge according to the standard stated above.

The constitutionally significant error, if any, in the charge is not that it referred generally to important decisions

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[P] Mass. Adv. Sh. (1979) 1302, 1309-1310.

[10] It is also our "unbroken practice" not to allow use of a motion for new trial to compel a judge to review questions of law which could have been raised at the trial. Commonwealth v. McLaughlin, 364 Mass. 211, 229 (1973). Commonwealth v. Grace, Mass. , (1978) (Mass. Adv. Sh. [1978] 2697, 2698).

in the jurors' daily lives.[11] Rather it is the use of specific examples which, "far from emphasizing the seriousness of the decision before [the jurors], detracted both from the seriousness of the decision and the Commonwealth's burden of proof." Ferreira, supra at - .[q] We have consistently criticized the "personal decision-making" approach, but in the absence of specific examples have found no error. See Commonwealth v. Williams, Mass. , (1979)[r]; Commonwealth v. Allen, Mass. , (1979)[s] Commonwealth v. Adrey, Mass. , (1978)[t]; Commonwealth v. Seay, Mass. - (1978)[u];

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[11] State and Federal courts, including the United States Supreme Court, have consistently approved general references to the daily lives of jurors. See, e.g. Holland v. United States, 348 U.S. 121, 139-140 (1954); Hopt v. Utah, 120 U.S. 430, 439-441 (1887); United States v. Robinson, 546 F.2d 309, 313 (9th Cir. 1976); cert. denied sub nom. Chew v. United States, 430 U.S. 918 (1977); Foran v. Metz, 463 F.Supp. 1088, 1092 (S.C.N.Y. 1979). The rule in Federal Courts is that these general references should be phrased in terms of doubts which would cause jurors to "hesitate to act" in their own decisions, rather than those that would make them "willing to act." Holland, supra, at 140.

[q] Mass. Adv. Sh. (1977) at 1608-1611.

[r] Mass. Adv. Sh. (1979) 1431, 1449.

[s] Mass. Adv. Sh. (1979) 863, 871.

[t] Mass. Adv. Sh. (1978) 3008, 3018.

[u] Mass. Adv. Sh. (1978) 1994, 3006-3007.

Commonwealth v. Canon, 373 Mass. 494, (1977) cert. denied, 435 U.S. 933 (1978)[v]; Commonwealth v. Gilday, 367 Mass. 474, 497 (1975); Commonwealth v. Lovell, Mass. App. Ct. , (1978).[w]

Only once before have we considered a charge which included specific examples, and we found the use of analogies in the context of the entire charge, not to constitute reversible error. Commonwealth v. Grace, Mass , - (1978).[x] Grace was an appeal from the denial of a motion for new trial. Here, in addition, there is a direct appeal. We hold that the charge in this case, like that in Ferreira, supra, is a constitutionally inadequate definition "beyond a reasonable doubt." The use of specific examples "trivializes" the standard of proof in the direction of the "preponderance of the evidence" standard. Cf. Bumpus v. Gunter, 452 F.Supp. 1060, 1061 (D.Mass. 1978).[12]

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[w]Mass. App. Ct. Adv. Sh. (1978) 289, 297.

[x]Mass. Adv. Sh. (1978) 2697, 2698-2699.

[12]We do not believe that it is wise to dissect a charge to determine if each part is constitutionally adequate. Instaed we think a court must consider a charge in its totality to assess the impression it may have left with jurors. Commonwealth v. Rodrigues, 370 Mass. 684, 690-691 (1976), and cases cited.

Although we find constitutional error in this charge, we must also consider whether this holding applies to the present defendant, whose trial took place some seven years before our decision in Ferreira, supra. We believe that In re Winship, 397 U.S. 358 (1970), made retroactive by Ivan v. New York, 407 U.S. 203 (1972), mandates retroactive application of Ferreira. We emphasize, however, that we will scrutinize more carefully jury instructions given after the date of Ferreira. Cf. Commonwealth v. Rodriguez, 370 Mass. 684, 692 (1976); Commonwealth v. Collins, Mass. , (1978);[y] Commonwealth v. Stokes, Mass. , (1978).[z]

We must next consider whether the error in the present case, while of constitutional dimension, was harmless. Chapman v. California, 386 U.S. 18 (1967). Commonwealth v. MacDonald, 368 Mass. 395,

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[y]Mass. Adv. Sh. (1978) 627, 631.

[z]Mass. Adv. Sh. (1978) 610, 620.

[aa]Mass. Adv. Sh. (1979) 647, 657.

399 (1975). Commonwealth v. Hangar, Mass. , (1979).[aa] The reasonable doubt standard is most crucial in cases where central facts (such as identity, or the occurrence of an event) are at issue, and credibility plays a key role. The present case involved no such dispute; the defendant testified and corroborated all of the essential elements of the Commonwealth's case. The homicide here occurred in broad daylight in the presence of witnesses who testified. Even if Garcia had not testified, the circumstantial and direct, eyewitness testimony implicating him was very strong. The only issues the jury faced were whether the killing was justified in self-defense and, if so, whether Garcia exercised that right imperfectly (to result in manslaughter) or, if not, whether the killing was first or second degree murder. Therefore, unlike Ferreira, where we expressly stated that we considered the charge in the light of "not overwhelming" evidence of Ferreira's guilt, Ferreira, supra, at ,[bb] the present case involves overwhelming evidence of guilt. We are convinced beyond a reasonable doubt that the error did not contribute to the guilty verdict, and

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[bb] Mass. Adv. Sh. (1977) at 1608.

and that it was therefore harmless. See Chapman, supra at 22-24.

b. Burden of proof. Garcia further maintains that the judge failed to tell the jury that the Commonwealth bears the burden of proof of the voluntariness of his statements. While the judge did not specifically so state, he told the jury that the Commonwealth must prove every element of the case beyond a reasonable doubt, and then included the confession (and its voluntariness) as part of the case. The jury could easily have inferred that the Commonwealth had to prove the voluntariness of Garcia's confession beyond a reasonable doubt. Although as discussed above, the judge's definition of reasonable doubt was deficient, even assuming--and we do not decide this--that the instructions effectively reduced the standard of proof to preponderance of the evidence, that is the Federal cosntitutional standard for voluntariness of a confession. Lego v. Twomey, 404 U.S. 477, 486 (1972). While it is preferable that a trial judge include in the jury instructions on

voluntariness, if given,[13] and explicit instruction on the burden of

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[13]This court has never held, as a matter of constitutional law, that the defendant has a right to have the jury reconsider the voluntariness of his confession. Commonwealth v. Alicea, supra, at (Mass. Adv. Sh. [1978] at 2725). Commonwealth v. Pratt, 360 Mass. 708, 714-715 (1972). Cf. Commonwealth v. Harris, 371 Mass. 462 (1976). In Harris, we held that as a matter of Massachusetts practice, where a judge admits a confession in evidence after determining that it was made voluntarily, and there is evidence of coercion, it is reversible error not to submit the issues of voluntariness to the jury. Id. at 474. The United States Supreme Court recognized that some States follow the "Massachusetts procedure", but it held that there is no Federal constitutional right to have the jury reconsider voluntariness. Lego v. Twomey, 404 U.S. 477, 481 n. 3, 489-490 (1972).

The Federal Constitution of course requires that at some point in the proceedings before a confession is admitted in evidence, the defendant must "have a fair hearing and a reliable determination [by a judge] on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. Jackson v. Denno, 378 U.S., 368, 377-378 (1964).

(Relevant portions of the two charges defining "beyond a reasonable doubt")

FERREIRA	GRACE
Now, the term "beyond a reasonable doubt" is a legal shorthand expression that encompasses the degree of certainty that rule of law requires before a jury may convict a person of any crime.	Now, the words "beyond a reasonable doubt" stand for the standard of certainty that the law requires before a person may be convicted of any crime.
It does not mean that the Commonwealth has to prove the defendant guilty	"Beyond a reasonable doubt" does not mean that the Commonwealth has to prove a person's guilt

FERREIRA	GRACE
to a mathematical or absolute certainty	to an absolute or mathematical certainty
There will hardly ever be a case that a jury will ever sit on that is so open and shut that there isn't a possibility that the defendant didn't do it	There will hardly ever be a case heard by a jury that is so open and shut that there is no possibility of the person being innocent
That is now what we are looking for	That is not what we mean.
What we mean, rather, is that after reviewing in your minds hashing it over amongst yourselves the evidence, discussing it	What we mean, rather, is that you have to be sure, after weighing the evidence, after discussing the testimony you have heard amongst yourselves, after
determining what part	determining what part,

FERREIRA

of any story
you are going to believe
what conclusions you are
going to draw

--you must be sure

that Mr. Ferreira is guilty

[NB: Last sentence of this section, infra, is similar.]

GRACE

all, part, or none,
of any witness's story
you are going to believe
after drawing the inferences
that
you think are reasonable from
the evidence that you believe,
it means that
you must be sure
to a moral certainty
that the defendant is guilty
of the crime, as I will explain them.
If after evaluating the evidence
in your minds, if you have any
serious unanswered questions about
the guilt of any defendant of a
crime with which he is charged,

FERREIRA

Otherwise, you must give him the benefit of the doubt and acquit him

You must be as sure as you would have been any time in your own lives that you had to make important decisions

effecting your own economic or social lives. You know, anytime that you had to make an important decision,

GRACE

then he must be given the benefit of the that doubt and acquitted.
Now, I said you have to be sure. What we mean is that you have to be as sure as you would ant to and probably have been when in your own lives you have had an important economic or social decision that you have had to make effecting your own personal lives. We all know that we have to make that kind of decision,

FERREIRA

that you couldn't be
absolutely
mathematically sure that
you were doing the right
thing--
you weigh
the pros and cons
and unless you were

reasonably sure
beyond a reasonable doubt--

For example,
I imagine that
at one time or another
one or more of
you had to make a decision
as to

GRACE

that we can't be
absolutely
sure that
we are doing the right
thing.
But unless after weighing all
the pros and cons
we came to
the conclusion that
we are morally sure
we are doing the right thing,
then we don't act.
For example,
in your own lives
at sometime or other

you may have had to make a decision

FERREIRA

whether to leave school
or to get a job. Or to
continue with your education.

or to get married or
get divorced,
or to buy a house
or continue to rent,
or to pack up and leave
the community where you
were born and where
your friends are
and go someplace else
for what you hoped was
a better job

GRACE

whether to quit school
or get a job or to
go on with your education
or whether to get married
or stay single, or whether to
stay married or
get a divorce;
whether to buy a house
or continue to rent;
or whether to pack and move
to another location
and leave
your friends for

the offer of
a better job.

FERREIRA

Now, at any time you
had to make
a decision like that you know,

you couldn't be absolutely
sure

that you did the right thing-
but, you know,
you couldn't make a change
unless you were sure
beyond any doubt
that you could reasonably
explain that it was the right
move.

GRACE

Now, whenever you have
had to make
that type of decision,
you weigh the pros and cons
carefully. And
unless you are
sure
to a moral certainty
that you are doing the right thing

you don't act. You don't make the change

It is that type of sureness

FERREIRA	GRACE
This is what the law means when we say that in order to convict a a person of a crime, the jury must be convinced that he is guilty beyond a reasonable doubt.	that the law means by the expression "beyond a reasonable doubt."
If, after going over, weighing, evaluating all the evidence that you have heard, you have any serious unanswered questions about the guilt of the defendant, under our law he must be acquitted.	[NB: Similar sentence, supra]

* * * * * * * *

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NO. 80-1825

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

FRANK GRACE, et al.,
Petitioners

v.

FRED BUTTERWORTH, et al.,
Respondents.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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ISSUES PRESENTED.

1. Whether there was any constitutional error in a jury instruction which, in the course of defining reasonable doubt made reference to decisions in the jurors private lives and informed jurors of sentencing and parole consequences?

2. Whether the Court of Appeals properly rejected petitioners' contention that the Massachusetts' Supreme Judicial Court's disposition of their case was "so arbitrary and capricious" as to violate Fourteenth Amendment standards?

The respondent does not object to petitioners' citation to Opinions below, Statement of Jurisdiction and Designation of Parties.

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Respondents.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE

The petitioners, brothers, were tried together in the Bristol Superior Court before a judge and a jury, for the murder of one Marvin Morgan. The jury returned verdicts of first degree murder for Frank Grace and second degree murder for his brother, Ross Grace. Both were sentenced to life imprisonment.

After the petitioners' direct appeal was entered in the Supreme Judicial Court, but before it was heard, the petitioners filed motions for a new trial alleging the existence of newly discovered evidence. The petitioners' motions were denied on February 26, 1975, and the appeals from the conviction as well as from the denial of the motions for new trial were consolidated for review by the Supreme Judicial Court, which, on August 3, 1976, affirmed. Commonwealth v. Frank Grace, 370 Mass. 746, 352 N.E. 2d 175 (1976); Commonwealth v. Ross Grace, 370 Mass. 759, 352 N.E. 2d 183 (1976).

Petitioners subsequently sought relief in the federal court pursuant to 28 U.S.C. §2254. Their application for a writ of habeas corpus was dismissed on March 27, 1978. On November 17, 1978, the order of

the District Court was affirmed by the Court of Appeals for the First Circuit. Grace v. Butterworth, 586 F. 2d 878 (1st Cir. 1978).

While this first application for a writ of habeas corpus was pending, the petitioners filed in the Superior Court a second motion for a new trial alleging that the trial judge's charge to the jury violated their right to due process of law. This motion was denied by the trial judge. That denial was affirmed on September 29, 1978. Commonwealth v. Grace, 376 Mass.____, 381 N.E. 2d 139 (1978). A second application for writ of habeas corpus was filed and denied in the District Court. On February 5, 1980 the First Circuit affirmed. Grace v. Butterworth, 635 F. 2d 1 (1980). On February 19, 1980, petitioners moved for rehearing on the

basis of a decision by the Supreme Judicial Court in Commonwealth v. Garcia, Mass. Adv. Sh. (1980) 21, 399 N.E. 2d 460 (1980).

On June 27, 1980, the Court of Appeals, while retaining jurisdiction, ordered the petitioners to present their new and unexhausted claim, "that the state had, in less than even-handed manner, granted retroactive benefits of its law to one party while capriciously withholding it from another," to the Supreme Judicial Court. Grace v. Butterworth, 635 F. 2d 7

On November 12, 1980, the Supreme Judicial Court, after consideration of petitioners' petition for reconsideration, again affirmed the denial of petitioners' motion for a new trial. Commonwealth v. Grace, Mass. Adv. Sh. (1980) 2345, 412 N.E. 2d, 354. Thereafter in a per curiam opinion the Court of Appeals again affirmed

the district courts' denial of petitioners' petitions for writs of habeas corpus. Grace v. Butterworth, 635 F. 2d at 11.

REASONS FOR NOT GRANTING THE WRIT.

I. THERE IS NO ERROR OF CONSTITUTIONAL DIMENSION IN THE CHARGE ON REASONABLE DOUBT.

A. Reference to Parole Consequences Does Not Constitute Constitutional Error.

Petitioners allege constitutional error by reason of the trial judge's comment upon the differences in punishment for verdicts of first degree and second degree murder.

> "For first degree murder, the sentence is life in prison; and that person is not elibible for parole. He stays there until and unless pardoned by the Governor and the Council.
>
> For second degree murder, the punishment is life in prison; and he is eligible -- I don't say that he will be, but he is eligible for parole in 15 years." (Tr. 1352-1353).

The petitioners objected and excepted at trial, but did not assign it as error or argue the issue on appeal. "Thus, this claim of error [had] been waived" Commonwealth v. Grace, 381 N.E.2d 139, 141 (1978). Therefore, under Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977), (the petitioner having established neither cause nor prejudice) the issue is waived for federal habeas corpus purposes.[1/]

Were the issue deemed to have been preserved, petitioners cite no controlling authority which recognizes such alleged

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1/Petitioners' can hardly argue lack of awareness of the legal issue where they raised the matter at trial and later waived it on appeal. Moreover in Commonwealth v. Ferreira, 364 N.E.2d 1264, 1270-1272 (1977) the Supreme Judicial Court in reversing on a similar instruction made clear its holding was firmly grounded in prior case law. The Court made no mention of reversal being constitutionally required.

error as being of constitutional dimension. Taylor v. Kentucky, 436 U.S. 478 (1978), holding that an instruction on the presumption of innocence is constitutionally required, does not by its terms render reference to parole consequences constitutionally infirm.

B. The Use of Analogies in Defining Reasonable Doubt is not Constitutionally Impermissable.

Under the rule of In Re Winship, 397 U.S. 358 (1970), the prosecution is required to prove a defendant's guilt beyond a reasonable doubt; that burden extends to proof beyond a reasonable doubt of every essential element of the crime charged. Mullaney v. Wilbur, 421 U.S. 684 (1975). In this context, it is submitted,

error in jury instructions is of constitutional dimension only where the alleged error operates to shift the burden of proof to the defendant and it, when viewed in the context of the entire charge, operates to violate a right guaranteed by the Fourteenth Amendment. See Cupp v. Naughten, 414 U.S. 141, 145-146 (1973).

There is no constitutionally prescribed definition of reasonable doubt and, it is suggested, such definition is best left to the trial courts to develop within the constitutional framework which this Court has provided as, for example, in the area of definition of effective assistance of counsel. See McMann v. Richardson, 397 U.S. 759, 771 (1970).

It is suggested that the First Circuit has taken the appropriate tack in stating

> "Unless this Court is to end up imposing pattern jury instructions, we must tolerate a reasonable range of expression, some or even much of which may not suit our fancy." Bumpus v. Gunther, 635 F. 2d 907, (1980).

Such recognition of the trial court's function is consistent with the teachings of this Court in Cupp v. Naughten, supra at 149.

Although the Supreme Judicial Court did in Commonwealth v. Garcia, Mass. Adv. Sh. (1980) 21, 399 N.E.2d 460 (1980) refer to the jury instruction, using similar analogies, as "constitutionally inadequate," later discussion of the case in Commonwealth v. Grace at 357 indicates that it had in Garcia found the charge as a

whole inadequate, under state law. In the instant case the charge as a whole was held to be adequate particularly in light of the trial courts emphasis on moral certainty.[2/]

Moreover, it should be noted that in the Supreme Judicial Court's passing reference to the instruction in Garcia as being "constitutionally inadequate" the Court referenced the decision of the federal district court in Bumpus v. Gunther, 452 F. Supp. 1060 (1978). However, the district court's

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2/The Court had instructed:

> "But unless after weighing all the pros and cons we come to the conclusion that we are morally sure we are doing the right thing than we don't act.
>
> . . . .
>
> And unless you are sure to a moral certainty that you are doing the right thing, you don't act." (Tr. 1348).

finding that there was constitutional error in the reasonable doubt instruction in that case, did not survive review in the Court of Appeals for the First Circuit.

> "We disagree with the district court's mode of analysis, although not with its end result. In our view, the district court applied a less rigorous standard than was appropriate in deciding whether defects in the charge amounted to "constitutional error," and then rescued the charge by applying harmless error review. This approach resulted in dignifying as "constitutional error" flaws in the court's charge which were not of that level of seriousness, and then, in effect, downplaying the concept of constitutional error by holding that it was harmless." (footnote omitted).
>
> Bumpus at 909.

The Court continued to hold that instructions, including reference to "affairs of life" were not so seriously flawed as to constitute constitutional

error. Thus any underpinning for the state court's reference to constitutional inadequacy has been removed. In any event, a state court's construction of federal constitutional standards is not binding on the federal court. Roy v. Hall, 521 F. 2d 120 (1st Cir. 1975).

It is submitted that neither this nor any other court has held the use of analogies in an instruction on reasonable doubt to be per se unconstitutional.

II. THE MASSACHUSETTS SUPREME JUDICIAL COURT'S DISPOSITION OF PETITIONER'S CASE PRESENTS NO CONSTITUTIONAL CLAIM.

The contention that the Supreme Judicial Court misapplied its own law does not raise a constitutional claim in the absence of a showing of invidious discrimination . Beck v. Washington, 369 U.S. 551, 554 (1909).

> "[T]he 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions..., any more than, in guaranteeing due process, it assures immunity from judicial error..." Milwaukee E.R. & L. Co. v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 106 (1920).

Within the procedural context in which petitioner raised his challenges to the jury instructions, by way of a motion for new trial, the disposition of his case was entirely proper. The cases of Commonwealth v. Ferreira, 364 N.E. 2d 1264 (1977) and Commonwealth v. Garcia, 399 N.E.2d 460 (1980) came before the court on direct appeal and the issues were considered under the court's powers pursuant to G.L. c. 278, §33E which brings to the court "the whole case for its consideration of the law and the evidence," and the Court may, "if

satisfied that the verdict was against the law or the weight of the evidence, ... or for any other reason that justice may require," order a new trial or direct entry or a verdict of a lesser degree of guilt. In Ferreira and Garcia the Court exercised that power to review the issue in the absence of an objection or exception. The instant case did not come before the Court under 33E. However, the Court in its discretion reviewed petitioners case to determine whether there was a substantial liklihood that a miscarriage of justice had occurred. The Court noted the factors influencing that decision:

> "... the weight of the evidence, the seriousness of the deficiencies in the instructions taken as a whole, the extent to which the defects had been disclosed in opinions of this Court or of the Supreme Court

> before the instructions were given, the prior opportunities of defense counsel to make the challenge on appeal and in post-conviction proceedings and whether the appeal is subject to the special duty imposed on us by §33E."

Commonwealth v. Grace, at, 417 N.E.2d 357. The Court, as noted above, found the charge as a whole to be adequate within the context of the particular case and in the form in which the issue was presented. Certainly this Court has recognized the distinction between direct and collateral review. See Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

The manner in which the Supreme Judicial Court resolved petitioner's claim clearly involves no constitutional issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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